

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, TREASURER OF
PUERTO RICO, PETITIONER,

vs.

YABUCOA SUGAR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 2, 1938.

CERTIORARI GRANTED JANUARY 30, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, TREASURER OF
PUERTO RICO, PETITIONER,

vs.

YABUCOA SUGAR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., First Circuit.....	1	1
Caption	1	
Record from District Court for San Juan, Puerto.....	1	1
Amended complaint	1	1
Demurrers to amended complaint.....	8	6
Order sustaining demurrers	9	7
Motion for reconsideration, etc.	10	8
Judgment	16	14
Notice of appeal to Supreme Court of Puerto Rico.....	17	15
Proceedings in Supreme Court of Puerto Rico.....	18	15
Judgment	18	15
Motion for reconsideration	19	16
Opinion of Court, Wolf, J., on motion for reconsideration.	23	20
Order denying motion for reconsideration.....	24	21
Memorandum re appeal papers.....	25	22
Assignment of error	25	22

JUDG & DETWEILERS (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 13, 1939.

INDEX

	Original	Print
Proceedings in Supreme Court of Puerto Rico—Continued.		
Translator's certificate (omitted in printing) ..	26	
Stipulation as to transcript of record.....	26	23
Clerk's certificate (omitted in printing) ..	27	
Memorandum re enlargement of time.....	27	23
Minute entry of hearing	28	23
Opinion, Bingham, J.	29	24
Concurring opinion, Wilson, J.....	34	29
Dissenting opinion, Morton, J.	40	34
Judgment	43	37
Recital as to issuance of mandate.....	44	37
Clerk's certificate (omitted in printing) ..	44	
Order excluding time within which to apply for writ of certiorari	45	37
Order allowing certiorari	46	37

[fol. 1] [Caption omitted]—

**IN DISTRICT COURT FOR THE JUDICIAL DISTRICT
OF SAN JUAN, PUERTO RICO**

Civil No. 18,886

YABUCOA SUGAR COMPANY, Plaintiff,

v.

**MANUEL V. DOMENECH, as Treasurer of Puerto Rico,
Defendant**

Refund of Taxes

AMENDED COMPLAINT—Filed July 11, 1933

To the Honorable Court:

Now comes the plaintiff in the above entitled case, by its undersigned attorney, and as its cause of action against Manuel V. Domenech, Treasurer of Puerto Rico, respectfully states and alleges:

I. That the plaintiff, Yabucoa Sugar Company, is a corporation created and organized under the laws of Puerto Rico.

[fol. 2] II. That the defendant, Manuel V. Domenech, is of legal age, and at present holds and fills the office of Treasurer of The People of Puerto Rico, a political entity organized in accordance with an Act of Congress of the United States of America, approved March 2, 1917, known as the Jones Act, the said Manuel V. Domenech having the rights and duties inherent to the office of Treasurer of Puerto Rico.

III. That for the taxable year 1927, that is, the fiscal year included between July 1, 1926 and June 30, 1927, the plaintiff filed with the Treasurer of Puerto Rico, for purposes of income tax, a return showing a taxable income of \$201,879.29, and at the request of the Treasurer of Puerto Rico paid to the treasury of the island the sum of \$25,234.92, as per receipt number 33 of the year 1927.

IV. That on October 31, 1928, the defendant notified the plaintiff having practiced an investigation in the books of account of the Yabucoa Sugar Company and requested the plaintiff to pay to the Treasurer of Puerto Rico the additional sum of \$1,301.51, besides the \$25,234.92 already paid, as per receipt No. 33 for the fiscal year 1927, that is on a

net taxable income of \$211,725.26 for said year, instead of the \$201,879.29 specified in the return filed by the plaintiff.

V. That the liquidation, as appears from the notice of deficiency prepared by the Treasurer and served on the plaintiff October 31, 1928, levying the said additional tax of \$1,301.51, is as follows:

Gross income, as shown by the books	\$2,093,716.31
Less Income not subject to taxation:	
Corporation dividends	\$794.50
Income Tax Reserve	5,527.60
Depreciation fund	1,210.00
	<u>7,352.10</u>
Total gross income	\$2,086,184.21
General deductions as per the books	\$1,883,285.51
Plus net loss for the year 1926	17,847.85
Total	<u>\$1,900,733.36</u>
[fol. 3] Less items stricken out:	
Income tax reserve	\$28,527.60
Depreciation fund	\$64,934.64
Liquid fund	63,774.64
	<u>1,210.00</u>
Donations	576.81
	<u>\$30,314.41</u>
Total general deductions	<u>\$1,840,458.95</u>
Total net income	<u>\$215,725.26</u>
Tax liquidation:	
12½% of \$211,725.26 (that is a net income of \$215,725.26 less \$4,000 exempted by law)	\$26,465.66
Interest at 6% per annum on a deficiency of \$1,230.74 (\$26,465.66 less \$25,234.92 previously paid)	<u>70.77</u>
Total tax and interest	<u>\$26,536.43</u>
Less tax paid as per receipt No. 33	<u>\$25,234.92</u>
Total tax and surcharges payable	\$1,301.51

VI. That from the assessment made by the Treasurer to which the foregoing paragraph of this complaint refers, the plaintiff appealed to the Board of Review and Equalization; and the latter in its session of December 23, 1929, as per notice served by the Board on the plaintiff, on January 16, 1930, decided the appeal as follows:

"San Juan, Puerto Rico, January 16, 1930.

Order

Income Tax.

Taxable Year 1926 and 1927.

Taxpayer: Yabucoa Sugar Company.

Town: Humacao, Puerto Rico.

GENTLEMEN:

I take pleasure in informing you that the appeal specified herein was decided by this Board of Review and Equalization in its session of December 23, 1929, as follows:

[fol 4] Year 1926

Repairs:

To consider the repairs charged on your books of account as of an incidental nature deductible in their entirety from the gross income, with the exception of the items hereinafter detailed, considered as improvements to the property:

Mills	\$15,119.48
Fixed rails	975.57
Locomotives	1,159.25
Supply pump	954.48
Total	\$18,208.78

Other Items:

As regards the other allegations it was agreed that the assessments made by the Finance Department be affirmed.

Year 1927

Net Loss for the Year 1926:

To grant as a deduction from the gross income, as loss for the year 1926, that resulting from the liquidation of said case in accordance with the resolution of this Board.

Other Items :

As regards the other items the Board agreed to affirm the assessment made by the Department of Finance.

Respectfully, A. Carrion, Acting Secretary, Board of Review and Equalization."

VII. That the Board of Review and Equalization in deciding the appeal of this plaintiff accepted all the items specified in the notice of deficiency prepared by the department of finance, transcribed in the first paragraph of this complaint, with the exception of the item "Repairs" for the year 1926, carried to the year 1927, the Board deciding that the total amount appearing in the books of the plaintiff company on that account be admitted, less \$18,208.78 mentioned in said order.

[fol. 5] VIII. That the repairs charged on the books of the plaintiff for the year 1926, to which the order of the Board of Review and Equalization transcribed in the Fifth Paragraph of this complaint refers, amount to the sum of \$133,700.61, of which amount, according to said order the item "improvements" to the value of \$18,208.78 should be stricken out, there remaining consequently as admissible deduction on this account, accepted by the Board of Review and Equalization, the sum of \$115,491.83.

IX. That as per the notice of deficiency dated October 31, 1928 served by the defendant on the plaintiff, the former accepted as a deduction, for repairs for the year 1926, the sum of \$51,216.65. and the Board of Review and Equalization by an order of December 23, 1929, transcribed in the sixth paragraph of this complaint, having determined that the plaintiff was entitled to a deduction of \$115,491.83 for repairs, that is, the total sum of \$133,700.61, appearing on its books as spent for repairs, less the item of \$18,208.78 for improvements stricken out by the Board of Review and Equalization, it is then evident that the plaintiff is entitled to an additional deduction for repairs for the year 1926 of \$64,275.18, that is the difference between the sum of \$115,491.83, specified in the eighth paragraph of this complaint, and the \$51,216.65 admitted by the treasury department in its notice of deficiency.

X. That in accordance with the ruling of the Board of Review and Equalization, rendered in the appeal taken by

the plaintiff, the liquidation of the net income and the income tax to be paid by the plaintiff for the year 1927, should have been as follows :

Net income on appeal to the Board as per notice of deficiency prepared by the department of finance, transcribed in the fifth paragraph of this complaint	\$215,725.26
Additional deduction granted by the Board as per its ruling of December 23, 1929 (as alleged in the ninth paragraph of this complaint)	<u>64,275.17</u>
Net income fixed as per ruling of the Board	\$151,450.09

[fol. 6]

Tax Liquidation

12½ per cent of \$147,450.08 (the net income less \$4,000 exempted by law)	\$18,431.26
Paid as per receipt No. 33 of the year 1927	<u>25,234.92</u>
Amount to be refunded to the plaintiff (plus the corresponding interest)	\$6,803.66

XI. That the plaintiff, once the appeal on the deficiency determined by the Honorable Treasurer of Puerto Rico was decided by the Board of Review and Equalization, filed before the latter officer in the month of February, 1930, a petition for refund or credit, which was decided by the Honorable Treasurer of Puerto Rico, the 28th of March, 1930, by granting to the plaintiff a credit or refund in the amount of \$525.56, instead of the sum claimed by the plaintiff in accordance with the above ruling of the Board of Review and equalization.

XII. That from the above decision of the Honorable Treasurer of Puerto Rico to the petition for refund or credit filed by the plaintiff, the latter appealed in April, 1930, to the Board of Review and Equalization; and the Board on August 22, 1932, decided the said appeal by affirming its original ruling of December 23, 1929, entered in the appeal taken with regard to the deficiency.

XIII. That the Treasurer of Puerto Rico in granting to the plaintiff a refund for taxes in the amount of \$525.56, plus \$60.61 for interest, instead of the \$6,803.66, plus the

interest claimed by the plaintiff, has done so in an arbitrary, unlawful, capricious and wilful manner, and without any authority or power to do so, thus altering and modifying the ruling of the Board of Review and Equalization and disobeying the terms of said ruling and if he had obeyed the ruling and had liquidated the tax in conformity with the terms of said ruling, as detailed in the tenth paragraph of this complaint, he would have ordered a refund to the plaintiff for the sum of \$6,803.66, plus interest.

Wherefore, the plaintiff prays this Honorable Court that judgment be rendered in due course sentencing the defendant [fol. 7] to refund or credit to the plaintiff the sum of \$6,803.66, plus the corresponding interest.

San Juan, Puerto Rico, July 11, 1933.

Mariano Acosta Velarde, Attorney for the Plaintiff.

Duly sworn to by Mariano Acosta Velarde. Jurat omitted in printing.

Copy served this eleventh day of July, 1933.

Charles E. Winter, R. Cordoves Arana, Attorneys for Defendant.

[fol. 8] [File endorsement omitted.]

IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

DEMURRERS TO AMENDED COMPLAINT—Filed August 11, 1933

Now comes the defendant by his undersigned attorneys and in opposition to the amended complaint brought herein files demurrers thereto for the following grounds:

I. Because this court lacks jurisdiction by reason of the subject-matter to entertain this case, inasmuch as it does not appear from the complaint that the tax whose refund is claimed was paid under protest.

II. Because the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

Wherefore, the defendant prays this Honorable Court that these demurrers be sustained and the complaint over-

ruled, with all other legal pronouncements, and sentencing the plaintiff to pay the costs of this suit.

San Juan, Puerto Rico, August 10, 1933.

Charles E. Winter, Attorney General. R. Cordoves Arana, Assistant Attorney General.

Copy served this tenth day of August, 1933.

Mariano Acosta Velarde, Attorney for the Plaintiff.

[File endorsement omitted.]

[fol. 9] IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

ORDER SUSTAINING DEMURRERS

From the averments of the amended complaint it appears that the payment of the income tax whose return in part is requested by the plaintiff, was made at the request of the Treasurer of Puerto Rico, without protest whatever, that is to say, voluntarily.

The plaintiff maintains in its brief that we are not dealing with an action for the recovery of taxes paid under protest, but with an action for the refund of taxes, based on Section 62-b of the Income Tax Law of 1925. While it is true that this section authorizes the initiation of a judicial proceeding for any part of the amount deducted by the Board of Review and Equalization, as a result of a claim in abatement of the deficiency assessed by virtue of Section 57-D, it does not authorize the court before which the judicial proceeding is brought to order the Treasurer to refund or return taxes paid in excess prior to the claim, when payment has been made without protest. See Section 76 of the aforesaid income tax law of 1925 and Act No. 8 of 1927, Section 3 of which "provided a manner of payment and right of action that was prospective and exclusive of previous manners". *Loiza Sugar Co. v. Domenech*, Treasurer, 45 P. R. R. —; *American Colonial Bank v. Domenech*, Treasurer, 43 P. R. R. —.

A perusal of the entire Section 62 above cited will clearly show that the claim in abatement is a procedure to be followed prior to the collection of the tax and that to stay the same till the final result of the claim a bond to answer for that part of the claim unabated, as well as the interest thereon, must be given.

The authorization granted to the Treasurer of Puerto Rico by Section 75 of the Act of 1925 "to remit, refund and

pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to the Legislature of Puerto Rico at the beginning of each regular session of all transactions under this section", does not authorize the court either to order the re-[fol. 10] fund of taxes not paid under protest; and if, as alleged in the amended complaint, the Board of Review and Equalization decided that the plaintiff is entitled to a refund of \$6,803.66 and that the Treasurer has not liquidated the credit accordingly, the remedy of the plaintiff is not to resort to the courts but to the Legislature. *Guerra v. Treasurer*, 8 P. R. R. 280; *Alonso Riera & Co. v. Benedicto, Treasurer*, 32 P. R. R. 98.

"Where The People of Puerto Rico has given its consent to be sued, in the cases, manner, place and courts prescribed by it, one who seeks to avail himself of such consent must pursue the remedy as it is provided by law, and must comply with the prescribed terms and conditions; otherwise the suit cannot be maintained." (*Nazario v. Gallardo, Treasurer*, 40 P. R. R. 760.)

The demurrers are hereby sustained and the plaintiff is granted a term of ten days to amend its complaint, if able to do so.

San Juan, Puerto Rico, November 4, 1933.

Pablo Berga, District Judge.

The parties were notified of the above ruling this sixth day of November, 1933.

Hector Gonzalez Blanes, Clerk.

IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

MOTION FOR RECONSIDERATION OR IN DEFAULT THEREOF FOR JUDGMENT—Filed December 8, 1933

To the Honorable Pablo Berga:

Now comes the plaintiff in the above-entitled case by its undersigned attorney and respectfully states:

That an order was entered herein sustaining the demurrers filed by the defendant to the complaint in the case at

bar, this court holding in its said order among other things that the right to recover taxes is limited to those cases in which payment is made under protest, and that it did not appear from the complaint that the amount whose refund the plaintiff claims was paid under protest.

That this Honorable Court, in establishing the above theory, cited the following cases: *Loiza Sugar Company [fol. 11] v. Domenech*, 45 P. R. R. —; *American Colonial Bank of Puerto Rico v. Domenech*, 43 P. R. R.

That the cases of *Loiza Sugar Company v. Domenech*, 45 P. R. R. —, and *American Colonial Bank of Puerto Rico v. Domenech*, 43 P. R. R. —, are not applicable to the case at bar, inasmuch as the same refer to payments made by the taxpayer by virtue of a ruling of the Board of Review and Equalization, that is to say, after the taxpayer appealed to the Board, and the latter decided the appeal, the taxpayer paid without protest; while the payment made by the Yabucoa Sugar Company is distinguished from those made by the Loiza Sugar Company and the American Colonial Bank of Puerto Rico, because the Yabucoa Sugar Company paid, not by virtue of a ruling of a board, but by virtue of a mistake committed before the Board rendered its decision.

The plaintiff wishes to plainly state that by virtue of the provisions of Act No. 8 of 1927, in every tax paid excepting income tax, if the taxpayer wishes to attack before the courts of justice the payment of the said tax, he must do so by paying under protest, but as regards income tax the plaintiff insists that the only payment to be made by the taxpayer under protest, if he intends to impeach the validity of the payment, is that made by virtue of a ruling of the Board of Review and Equalization.

When a taxpayer appeals to the Board of Review and Equalization from a decision of the Treasurer, it is because he believes or thinks that the decision or assessment of the Treasurer is erroneous. The Government allows to the taxpayer a means of impeaching the assessment or ruling of the Treasurer, which means consists in an appeal to the Board of Review and Equalization. Once the case is decided by the Board, the ruling is *prima facie* correct inasmuch as the taxpayer has been given an opportunity to defend itself, and that is why Act No. 74 of 1925, under paragraph (a) of Section 76, grants him the right to pay

under protest if he wishes to impeach the payment and to file the corresponding suit within 30 days from the date of payment. The court will please notice that that is a payment made by the taxpayer by virtue of a ruling of the Board, and that he has to resort to court within 30 days. [fol. 12] We have already said that the cases of Loiza Sugar Company v. Treasurer, 45 P. R. R. —, and American Colonial Bank v. Treasurer, 43 P. R. R. —, are not applicable to the case at bar, because said cases refer to payments made without protest by the taxpayers by virtue of a ruling of the Board of Review and Equalization. We will point to the court what the Supreme Court decided in said cases.

In Loiza Sugar Company v. Treasurer, 45 P. R. R. —, we find the following:

“ * * * The corporation requested the Treasurer to reconsider the assessment of the tax but its request was denied and hence it appealed to the Board of Review and Equalization, the latter affirming the assessment of the Treasurer. Then the corporation paid \$2,621.38. *The payment of said tax was not made under protest.*” (Italics supplied.)

— This shows plainly that the \$2,621.38 were paid by the Loiza Sugar Company by virtue of a ruling entered on appeal to the Board and that the payment was not made under protest.

In American Colonial Bank v. Domenech, 43 P. R. R. —, the tax was paid under protest. A reading of that case does not show whether the tax paid by the American Colonial Bank was for income or for some other purpose, but we infer that the tax paid by the plaintiff was as income tax, inasmuch as at page — of volume 43 of the P. R. R. the following appears in the opinion of the court:

“Section 3 of Act No. 8 provided a manner of payment and right of action that was prospective and exclusive of previous manners. Hence a previous act requiring suit within thirty days after action by the Board of Review and Equalization was necessarily repealed.”

From that statement of our Supreme Court we infer that the tax paid by the American Colonial Bank in said case was for income and that payment was made after the Board

of Review and Equalization intervened by affirming the opinion of the plaintiff that payments of income tax made after the Board of Review and Equalization has acted must be made under protest, if the taxpayer wishes to impeach said payment before the courts, but that the payment made [fol. 13] by the taxpayer before the Board of Review and Equalization intervenes does not necessarily have to be made under protest to be questioned before the courts.

It is true that Act No. 8 of 1927 refers to the payment of taxes in general and that said act requires that payment be made under protest and grants a term of one year to attack before the courts of justice any such payments made under protest. The plaintiff, however, is of the opinion that, when income tax is involved, the law applicable to the case is Act No. 74 of 1925, and we are saying this because otherwise we would have certain precepts of the act of 1925 which could never be applied or enforced. Act No. 8 of 1927 must be construed in accordance with the precepts of Act No. 74 of 1925, and it is well known that in construing a statute validity and force, if possible, must be given to all its provisions. Under Section 62, paragraph (b), of Act No. 74 of 1925, any party may bring a judicial proceeding within one year after the rendition of the final decision by the Board of Review and Equalization. That means that Act No. 74, when one of the cases comprised under Section 62 is involved, fixes a term of one year after the decision of the Board, while Act No. 8 of 1927 specifies the term of one year after making payment. We also notice that Section 64, in its paragraph (b), grants the right to a credit or refund within four years after the date of payment, while under Act No. 8 of 1927 the claim before the courts must be made within one year from the date of payment under protest. Paragraph (b) of Section 64 of Act No. 74 of 1925, in so far as pertinent, reads:

“ * * * no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, * * * ”

In accordance with the averments of the complaint, it is plain that the plaintiff, within four years, filed its motion for refund with the Treasurer, appealed to the Board and the latter decided the matter in favor of the plaintiff, but

the Treasurer refused to acknowledge the decision of the Board, and according to Section 76, paragraph (a), the ruling [fol. 14] of the latter is final. Hence the taxpayer resorted to this court.

For the above stated reasons we are of the opinion that the cases cited by this Honorable Court to hold that a taxpayer who does not pay under protest is not entitled to impeach said payment before the courts are not applicable to the present case, inasmuch as they refer to cases where the taxpayer paid by virtue of a decision of the Board of Review and Equalization, while our case is covered by other provisions.

The ruling handed by this Honorable Court contains the following citations :

Guerra v. Treasurer, 8 P. R. R. 280. We do not consider this case applicable because the tax was a property tax and not an income tax, which is covered by a special act.

Alonzo Riera v. Benedicto, 32 P. R. R. 98. This case refers to a tobacco tax and not to an income tax.

Nazario v. Gallardo, 40 P. R. R. 760, is the last case cited. This also is a decision based on the payment of a tax on coffee and not on an income tax.

The plaintiff wishes to plainly state that when income tax is involved the laws applicable are the special acts on the subject, and hence it maintains that a taxpayer who has paid income tax through mistake or unjustly assessed, or in an excessive amount, may resort to court to obtain the refund or return of the amount erroneously or unduly paid there being no need of paying under protest.

In the memorandum submitted to this Honorable Court in support of our complaint we forgot to cite paragraph (b) of Section 76 of Act No. 74 of 1925, as follows :

“No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard. [fol. 15] and the regulations established in pursuance thereof.”

Paragraph (b) of Section 76 clearly grants to the taxpayer the right to resort to the courts to claim an amount erroneously or excessively paid, provided that the taxpayer has presented to the Treasurer a motion for refund and has appealed to the Board, as established by the law on the subject and by the regulations approved in accordance therewith.

The pertinent part of Section 355 of the regulations reads :

"Suit or proceeding for the recovery of any income or excess-profits taxes alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected can be maintained by the taxpayer when the requirements of either of the following methods of procedure have been fulfilled :

"1. When the taxpayer receives notice from the Treasurer that the income tax has been determined, he may: (a) make a voluntary payment of the amount so determined (without filing an appeal from the Treasurer's determination of the tax to the Board of Review and Equalization); (b) file a claim for refund or credit with the Treasurer within four years from the time the tax was paid (see section 64-b; (c)) if the claim is denied by the Treasurer, the taxpayer may bring an ordinary action before a court of competent jurisdiction to recover the amount so paid.

"2. . . .

"The preceding paragraphs of this article outline the only manner in which a suit may be brought by the taxpayer for the recovery of taxes erroneously or illegally assessed or collected, or penalties collected, without authority, or any sums excessive or in any manner erroneously collected, and strict compliance with these provisions by any taxpayer bringing such suits or proceeding is required."

For the above stated reasons the plaintiff maintains that under the special income tax act—No. 74 of 1925—and under [fol. 16] the regulations approved by virtue of the provisions of said act, it is entitled to resort to court once the Board of Review and Equalization decided its motion for the refund by the Treasurer of the amount excessive or erroneously paid, without need of having paid under protest.

Wherefore, we pray this Honorable Court that its ruling on the demurrers be reconsidered, and if this Honorable Court is of the opinion that reconsideration does not lie, then the plaintiff prays that judgment be rendered dismissing the complaint.

San Juan, Puerto Rico, December 8, 1933.

Mariano Acosta Velarde, Attorney for the Plaintiff.

Copy served this eighth day of December, 1933.

Benjamin J. Horton, R. Cordoves Arana, Attorneys
for the Defendant.

[File endorsement omitted.]

IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

JUDGMENT

Considering the motion of the plaintiff praying that the ruling on the demurrers be reconsidered, or in default thereof that judgment dismissing the complaint be rendered, for the reasons stated in the order entered on November 4, 1933, sustaining the demurrers, which is made a part of this judgment, and considering, in reply to the arguments of the plaintiff in its motion for reconsideration, the fact that Section 62-b of Act No. 74 of 1925 and Section 355 of the regulations of the Treasury grant the right to bring judicial proceeding within one year after final decision of the Board in a claim in abatement, while Act No. 8 of 1927 specifies a term of one year after payment, in order to be entitled to bring suit, does not mean that in one case and the other payment should not be made under protest in order that the taxpayer may resort to court, in conformity with the provisions of Section 76-a of the aforesaid Act of 1925, it having been [fol. 17] decided that when the People has given its consent to be sued in the cases, form and tribunals by it determined, whoever wants to avail of that consent must ask for the remedy in the manner prescribed by law and comply with its term and conditions. (Nazario v. Gallardo, Treasurer, 40 P. R. 760.)

The court overrules the motion for reconsideration and the request of the plaintiff being considered, the complaint is dismissed without special pronouncements of costs.

San Juan, Puerto Rico, January 20, 1934.

Pablo Berga, District Judge.

Attest: Hector Gonzalez Blanes, Clerk.

IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

NOTICE OF APPEAL—Filed February 27, 1934

To the Clerk of the District Court for the Judicial District of San Juan, Puerto Rico, and to the Honorable Benjamin J. Horton, Attorney General of Puerto Rico, as Counsel for the Defendant:

GENTLEMEN:

Please take notice that the Yabucoa Sugar Company, plaintiff in the above-entitled case, feeling aggrieved by the judgment rendered herein on January 20, 1934, and served on this party on the 31st of the same month and year, appeals from the said judgment in its entirety to the Supreme Court of Puerto Rico.

San Juan, Puerto Rico, February 27, 1934.

Mariano Acosta Velarde, Attorney for the Plaintiff.

Copy served this twenty-seventh day of February, 1934.

Benjamin J. Horton, R. Cordoves Arana, Attorneys
for the Defendant.

[File endorsement omitted.]

[fol. 18] IN SUPREME COURT OF PUERTO RICO

Civil No. 6657

YABUCOA SUGAR COMPANY, Plaintiff and Appellant

v.

MANUEL V. DOMENECH, as Treasurer of Puerto Rico,
Defendant and Appellee

Appeal from the District Court of San Juan

Refund of Taxes

JUDGMENT—July 28, 1936

Whereas this is a suit for the refund of income tax brought under Act No. 74 of 1925, and dismissed because said tax was not paid under protest; and

Whereas this court held on the 24th instant in Puerto Rico Fertilizer Co. v. Domenech, Treasurer, following that of

Compania Agricola de Cayey, Ltd., v. Domenech, Treasurer. 47 P. R. R. —, that without payment under protest resort may not be had to the courts of justice from the ruling of the Treasurer;

Therefore, the appeal is dismissed and the judgment appealed from, rendered by the District Court of San Juan on January 20, 1934, is affirmed.

Let the parties be notified.

It was thus pronounced and ordered by the court as witness the signature of the Chief Justice. Messrs. Justices Cordova Davila and Travieso did not take part in this decision.

Emilio Del Toro, Chief Justice.

Attest: Joaquin Lopez, Secretary-Reporter.

[fol. 19] IN SUPREME COURT OF PUERTO RICO

MOTION FOR RECONSIDERATION

To the Honorable Court:

Now comes the Yabucoa Sugar Company, plaintiff and appellant in the above-entitled case, by its undersigned attorney, and respectfully states and alleges:

The plaintiff-appellant filed before the District Court of San Juan a complaint praying that the Treasurer of Puerto Rico be ordered to obey and give compliance to a ruling entered in favor of the plaintiff by the Board of Review and Equalization in an appeal taken thereto from a notice of the deficiency determined by the Treasurer of Puerto Rico.

The District Court of San Juan dismissed the complaint, and its judgment having been appealed to this Honorable Court, the latter affirmed the judgment of the court below on the following grounds:

"Whereas, this court held on the 24th instant in *Puerto Rico Fertilizer Co. v. Domenech, Treasurer*, following that of *Compania Agricola de Cayey, Ltd., v. Domenech, Treasurer*, 47 P. R. R. —, that without payment under protest resort may not be had to the courts of justice from the ruling of the Treasurer."

The plaintiff-appellant prays that the judgment of this Honorable Court in the above-entitled case be reconsidered.

because it is of the opinion that its appeal cannot be decided on the grounds and reasoning of the case of Puerto Rico Fertilizer Co. v. Domenech, for the following reasons:

(a) Because in the above-entitled case the Yabucoa Sugar Company appealed to the Board of Review and Equalization from the notice of deficiency determined by the Treasurer of Puerto Rico and the Board decided the appeal in favor of the plaintiff.

(b) Because in the case of Puerto Rico Fertilizer Company the plaintiff did not appeal to the Board of Review and Equalization, and resorted only to the courts of justice from the adverse ruling of the Treasurer, for which reason [fol. 20] this Honorable Court decided "that without payment under protest resort may not be had to the courts of justice from the ruling of the Treasurer".

(c) Because the right of the Yabucoa Sugar Company, plaintiff-appellant, is based on the fact that the Treasurer of Puerto Rico has no power to dismiss or amend a ruling of the Board of Review and Equalization, which ruling in accordance with the law is final; while in the case of Puerto Rico Fertilizer Company the scope and consequences of a ruling of the Board of Review and Equalization was not involved.

(d) Because in the above-entitled case the Yabucoa Sugar Company exhausted the administrative proceeding fixed by law, by appealing to the Board of Review and Equalization, while in the case of the Puerto Rico Fertilizer Company the taxpayer resorted to the courts of justice without exhausting the administrative right of appealing to the Board of Review and Equalization.

(e) Because in the above-entitled case the Yabucoa Sugar Company appeared before the courts of justice in order that the Treasurer of Puerto Rico be ordered to give compliance to a ruling of the Board of Review and Equalization favorable to the plaintiff, while in the case of the Puerto Rico Fertilizer Company the taxpayer resorted to a court of justice from an adverse ruling of the Treasurer of Puerto Rico.

(f) Because the right of the appellant Yabucoa Sugar Company to obtain from the defendant Treasurer of Puerto Rico the refund of the additional credit granted by the Board of Review and Equalization—which had been denied by the

Treasurer—is acknowledged by law and accepted by this Honorable Supreme Court in the case of *Puerto Rico Fertilizer Company v. Domenech*, as follows :

“Should the Board decide the appeal in favor of the taxpayer no part of the deficiency determined by the Treasurer and denied by the Board will be levied, the Treasurer being entitled to bring an action within one year, before a district court of competent jurisdiction, without assessment, for the recovery of any part of the amount so denied. Of course in said suit the taxpayer will have the opportunity to defend [fol. 21] himself and the ruling that may be proper in accordance with the law and the facts will be rendered.”

The above paragraph shows that the rulings of the Board of Review and Equalization are final and that the Treasurer of Puerto Rico may not impose any deficiencies dismissed by the Board, nor amend or modify the rulings of the Board of Review and Equalization, although the law grants to the Treasurer the right to resort to the courts of justice, within one year from the decision of the Board, to claim from the taxpayer any deficiency determined by him and dismissed by the Board of Review and Equalization.

There is no question that under the facts averred in the complaint the Yabucoa Sugar Company obtained from the Board of Review and Equalization a ruling in its favor; but the Treasurer of Puerto Rico, instead of obeying and complying with the afore-mentioned ruling of the Board of Review and Equalization, attempted to amend and modify the same and refused to grant to the plaintiff the credit to which he was entitled according to the ruling of the Board of Review and Equalization. By reason of these circumstances the plaintiff resorted to the courts of justice with the object of having the Treasurer obey the ruling of the Board of Review and Equalization, inasmuch as said officer has not filed any suit against the plaintiff within one year from the rendition of the ruling by the Board.

In order that this Honorable Court may notice the great difference existing between the case of *Puerto Rico Fertilizer Co. v. Domenech* and the one at bar, we shall make hereinafter an extract of the complaint, as follows :

Let it be remembered that the Yabucoa Sugar Company appealed to the Board of Review and Equalization from a notice of deficiency made by the Treasurer of Puerto Rico

(see paragraphs IV, V and VI of the complaint). On December 23, 1929, the Board of Review and Equalization decided the appeal in favor of the plaintiff-appellant and determined that the latter was entitled, besides the deductions granted by the Treasurer in his deficiency return, to an additional deduction of \$64,275.18 for repairs. (See paragraphs VI and VII of the complaint.)

The appeal on the deficiency determined by the Treasurer [fol. 22] of Puerto Rico having been decided by the Board of Review and Equalization in favor of the plaintiff-appellant, the latter requested from the Treasurer in conformity with the aforesaid ruling of the Board of Review and Equalization, a refund or credit by said officer to the appellant of the amount determined by the Board of Review and Equalization. The Treasurer of Puerto Rico, instead of crediting the plaintiff with the sum of \$6,803.66 to which it was entitled, as per the ruling of the Board of Review and Equalization (see paragraph VII of the complaint), solely granted to the plaintiff the sum of \$525.56, and hence the plaintiff took a new appeal to the Board of Review and Equalization, and this entity on the 22d of August, 1932, decided the appeal of the plaintiff by affirming and ratifying in its entirety its original ruling of December 23, 1929. (See paragraphs XI and XII of the complaint.)

From the foregoing statement of facts it is evident that the Yabucoa Sugar Company requests that the Treasurer of Puerto Rico be ordered to obey and comply with the ruling of the Board of Review and Equalization entered in an appeal taken thereto, and that the Yabucoa Sugar Company be credited with the sum determined by the Board of Review and Equalization, the plaintiff-appellant by no means pretending the refund or return of any sum or amount of money denied to it by the Board of Review and Equalization.

This Honorable Court held in Puerto [Rico] Fertilizer Co. v. Domenech that "should the Board decide the appeal in favor of the taxpayer no part of the deficiency determined by the Treasurer and denied by the Board will be levied", and this is exactly what the Yabucoa Sugar Company prays from this court.

As this Honorable Court has admitted that, in the case of Puerto Rico Fertilizer Co. v. Domenech, the Treasurer shall not levy any part of the deficiency determined by him and denied by the Board, it is evident that the cause of action of the Yabucoa Sugar Company is unquestionable, inasmuch

as the Treasurer of Puerto Rico is bound to obey the rulings of the Board of Review and Equalization, and if he were allowed to amend or modify said rulings, the latter will not be final as established by law and the appeal granted to the taxpayer would be a fairy tale, for the taxpayer would always be subjected to the Treasurer failing to obey the ruling [fol. 23] of the Board, as it happens in the present case, and that the opinion of the Treasurer should always prevail in spite of the fact that the Board had said that his opinion was erroneous and mistaken.

For the above stated reasons, most respectfully we pray this Honorable Court the reconsideration of the judgment rendered in the above-entitled case.

San Juan, Puerto Rico, August 1, 1936.

Mariano Acosta Velarde, Attorney for the Plaintiff-Appellant.

IN SUPREME COURT OF PUERTO RICO

OPINION DELIVERED BY MR. JUSTICE WOLF—March 17, 1937

On the 28th of July, 1936, we held, in a *per curiam* decision, that the appellant in this case was bound to follow the lot of the taxpayer in the case of *Puerto Rico Fertilizer Company v. Domenech*, decided by this court on the 24th of July, 1936. The Puerto Rico Fertilizer Company moved for a reconsideration and obtained it. The present appellant was permitted to appear on the rehearing of the Puerto Rico Fertilizer Company case, *supra*, as *amicus curiae*. It had also previously presented a motion for reconsideration of our said *per curiam* decision.

The appellant attempts to distinguish its position in this case from that of the Puerto Rico Fertilizer Company. It maintains that, given the circumstances of the payment in the present case, the appellant, to recover from the Treasurer, was not bound to pay under protest.

We can realize that it would have been difficult or almost impossible at the time of payment of the taxes for it to know that it was paying the same in excess of the amount due. It is necessarily true that when a taxpayer makes a voluntary payment he is ordinarily not conscious that such a payment is an excessive one.

The appellant sought to recover the excess payment from the Treasurer. Under Section 75 of Act No. 74 of 1925

(Session Laws, p. 400), which under our most recent opinion (Puerto Rico Fertilizer Company v. Domenech) we have held the act to be applicable, the Treasurer is authorized [fol. 24] "to remit, to refund and pay back all taxes erroneously or illegally assessed or collected. * * *"

This is a discretionary matter in the treasurer and our direct decision in the Puerto Rico Fertilizer [Company] case is that the said section gives the taxpayer no additional right to file a suit for the recovery of taxes. It makes no difference what the method taken by the taxpayer in the Puerto Rico Fertilizer Company case was, for we feel bound to hold without special reference to the procedure in that case, that its reasoning and the reasoning of this case compels us to declare that the appellant is without remedy by suit.

Taxes voluntarily paid in the absence of a statute authorizing it can not ordinarily be recovered. *Little v. Bowers*, 134 U. S. 54; 61 C. J. 985. It is true that under Act No. 80 of 1919 a direct suit was allowed against the Treasurer to recover taxes voluntarily paid. Since 1921, however, the right to bring suits for the recovery of taxes other than those paid under protest has been abrogated. *Compania Agricola de Cayey, Ltd. v. Domenech*, 47 P. R. R. —. The mere fact that the Legislature gave a taxpayer the right to recover under certain circumstances does not confer that right under different circumstances, namely, when a person does not pay under protest.

By legislative enactment a payment under protest is a condition precedent to recovery by suit.

The motion for reconsideration should be denied.

Adolph G. Wolf, Associate Justice.

IN SUPREME COURT OF PUERTO RICO

ORDER DENYING MOTION FOR RECONSIDERATION—March 17,
1937

For the reasons stated in the foregoing opinion, the motion for reconsideration is hereby denied.

It was so ordered by the court as witness the signature of the Chief Justice.

Emilio Del Toro, Chief Justice.

Attest: Joaquin Lopez, Secretary-Reporter.

[fol. 25] [Memorandum.—Petition for appeal filed May 22, 1937; order allowing appeal, dated May 24, 1937; citation, dated May 25, 1937, returnable in sixty days; cost bond for \$300, Adolfo Gorbea and Juan I. Gorbea, sureties; and order approving bond, dated June 23, 1937, are here omitted. A. I. Charron, Clerk.]

IN SUPREME COURT OF PUERTO RICO

ASSIGNMENT OF ERRORS—Filed May 22, 1937

To the Honorable Supreme Court of Puerto Rico:

Now comes Yabucoa Sugar Company, by its undersigned attorney, and files the following assignment of errors upon which it will rely on appeal to the United States Circuit Court of Appeals for the First Circuit:

I. The Supreme Court of Puerto Rico erred in holding that plaintiff-appellant was not entitled to the refund claimed since payment was not made under protest.

II. The Supreme Court of Puerto Rico erred in applying to this case Section 75 of Act No. 74 approved August 6, 1925, instead of applying Sections 64, 55 and 76 of said act

III. The Supreme Court of Puerto Rico erred in holding that plaintiff-appellant was without remedy by suit to recover the refund claimed in the complaint.

Wherefore, the appellant prays that the decree rendered in said cause by the Supreme Court of Puerto Rico be reversed and the cause remanded, with instructions as to further proceedings, and for other and further relief as may be just in the premises.

San Juan, Puerto Rico, this twenty-first day of May, 1937.

Mariano Acosta Velarde, Attorney for Appellant.

Notified with copy on this the twenty-first day of May, 1937.

B. Fernandez Garcia, Attorney General of Puerto Rico, Attorney for Defendant-Appellee.

[fol. 26] Translator's certificate to foregoing transcript omitted in printing.

IN SUPREME COURT OF PUERTO RICO

STIPULATION AS TO TRANSCRIPT OF RECORD

Comes now the plaintiff-appellant and the defendant-appellee in the above-entitled case, by their undersigned attorneys of record, and respectfully state and stipulate:

1. That the foregoing papers and proceedings had in the above-entitled case are true, complete and faithful copies of their respective originals, as the same appear on file and of record in the clerk's office of the Supreme Court of Puerto Rico.

2. That the defendant-appellee has received a copy of said transcript of the record, and both parties have agreed that it be sent to the United States Circuit Court of Appeals for the First Circuit at Boston, Mass., same to constitute the transcript of the record in this case for the purposes of the appeal taken by the plaintiff-appellant, it being unnecessary that the translation be certified by the official interpreter and translator of the Supreme Court of Puerto Rico.

San Juan, Puerto Rico, August 5, 1937.

Mariano Acosta Velarde, Attorney for Appellant.

B. Fernandez Garcia, R. Cordoves Arana, Attorneys for Appellee.

[fol. 27] Clerk's certificate to foregoing transcript omitted in printing.

[Memorandum.--An order of enlargement of time for docketing case to, and including, September 22, 1937, is here omitted. A. I. Charron, Clerk.]

[fol. 28] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT

MINUTE ENTRY OF HEARING

On January 26, 1938, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIRST CIRCUIT, OCTOBER TERM, 1937

No. 3274

PORTO RICO FERTILIZER COMPANY, Plaintiff, Appellant,

v.

RAFAEL SANCHO BONET, Treasurer, Defendant, Appellee

No. 3285

YABUCOA SUGAR COMPANY

v.

SAME

Appeals from the Supreme Court of Puerto Rico

Before Bingham, Wilson and Morton, JJ.

OPINION OF THE COURT—Filed July 13, 1938

BINGHAM, J.:

These are two appeals from judgments of the Supreme Court of Puerto Rico involving similar questions of law under the Insular Income Tax Act approved August 6, 1925. The facts are to be gathered from the complaints to which demurrers were filed, on the ground that they did not state a cause of action.

By the statute the taxpayer was required to file a return (37 (a), 39 (a) (b), and 27 (a)) and to pay the tax (53 (a) (b)) computed by the Treasurer upon the face of the return (54) without formal assessment.

In the complaint of the Fertilizer Company it was alleged that between June, 1926, and June, 1932, it returned and paid as withholding agent, income taxes on payments of [fol. 30] interest made by it to the Virginia-Carolina Chemical Corporation, amounting to \$42,300; that the Act required this to be done (35); that it required all persons making payments of interest to deduct and pay over to the Treasurer a stated percentage of such interest as a tax, not on the person making the payment, but on the person receiving such payment; that such taxes as applied to the Chemical Company were illegal and unauthorized because neither

the Chemical Company nor the loans made by it to the plaintiff ever had a taxable situs in Puerto Rico (*Domenech v. United Porto Rican Sugar Company*, 62 Fed. (2d) 552); that in October, 1933, the plaintiff filed claims for refund of the payments for these years with the Treasurer under the law of 1925; and that all the claims were denied by the Treasurer. All the taxes, refund of which was claimed by the Fertilizer Company, were of this character. Each payment of interest by the Fertilizer Company was made the subject of a separate count or claim. As to the payments made more than four years before the petition for refund was filed, it was conceded in the argument before the Supreme Court that they were barred by special limitation of the statute (four years after payment of the taxes, (Sec. 64 (b)), and they are no longer insisted on.

This case stands on the three last payments, which aggregated about \$20,000.

After the Treasurer had denied its claims for refund the Fertilizer Company brought the present suit in the District Court for San Juan, without having appealed from the Treasurer's denial of the claims to the Board of Review and Equalization, and, as above stated, the court dismissed its complaint.

In *Domenech v. United Porto Rican Sugar Co.*, 62 Fed. (2d) 552, this court held that the provisions of the Puerto Rico statute taxing payments of interest to non-residents was unconstitutional and, certiorari having been denied, that decision stands. It follows that the taxes on such payments of interest were illegal and constituted overpayments. Of this there can be no question.

In the *Yabucoa* case, the appellant filed returns showing ordinary income taxes to be due and paid such taxes without protest. Later the Treasurer determined a deficiency tax [fol. 31] against that company amounting to \$1,301.51 (Sec. 57 (a) (b)). From this determination (not assessment) the Sugar Company appealed to the Board of Review and Equalization which disallowed the deficiency and found that there had been an overpayment of general income taxes on its return of \$6,803.66. A claim for refund of this amount was thereupon filed with the Treasurer by whom it was disallowed. From this disallowance an appeal was taken to the Board of Review and Equalization (Sec. 76 (b)), which again found there had been an overpayment. The Treasurer still refusing to make refund, the present

suit was brought by the Yabucoa Company in the District Court of San Juan, which decided against it.

It thus appears that the plaintiff in each case is seeking to recover a refund of taxes paid on its return filed in the normal course with the Treasurer,—the Fertilizer Company on the ground that the tax thus collected was illegal and void in toto, and the Yabucoa Company on the ground that the tax collected was excessive; and that, in the Yabucoa case, the plaintiff appealed from the Treasurer's denial of its claim for refund before bringing suit, while the Fertilizer Company did not. In no other particular do the rights of the plaintiffs to maintain their causes of complaint differ. Otherwise stated, the plaintiffs in both cases are seeking a refund of taxes returned in the usual way, not assessed, and paid without protest, the only difference between them being that in the Yabucoa case, after denial of its claims for refund by the Treasurer, that company appealed to the Board of Review and Equalization before bringing suit, while the Fertilizer Company did not.

It is entirely clear that the provisions of Section 76 (a), when read in connection with Section 57 (a) and (b) relate to deficiency taxes, which have been levied (assessed) against the taxpayer within five years after his return was filed as provided in Section 60 (a) (1), and that the provision in Section 76 (a) that "the taxpayer shall pay under protest such tax" has to do only with a suit brought to test the validity of an assessed deficiency and to recover the whole or any part of the tax held to be invalid.

In the Yabucoa case, as the taxpayer filed its return in the usual way and paid the tax imposed by the statute and, [fol. 32] within four years from the time of payment (Section 64 (b)), presented its claim for refund to the Treasurer, who denied it, and appealed therefrom to the Board of Review and Equalization, the sole question is whether it can maintain a suit against the Treasurer under 76 (b) to recover what is justly due it, the tax having been paid without protest.

Section 76 (b) provides:

"(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to

have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

The plain meaning of this provision is that a suit may be maintained for the recovery of income taxes erroneously or illegally collected, provided a claim for refund has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal; there is no condition or proviso requiring that the tax in such case shall have been paid under protest. Section 76 (b) expressly recognizes that regulations interpreting it may be necessary. Section 68 authorizes the Treasurer "to prescribe needful rules and regulations for the enforcement of the Act"; and, on May 17, 1926, the Treasurer promulgated a regulation stating that a suit or proceeding for the recovery of an income tax erroneously or illegally collected could be maintained by the taxpayer (a) by making a voluntary payment; (b) by filing a claim for refund within four years from the time of payment; and (c) if the claim was denied by the Treasurer, the taxpayer could bring an ordinary action before a court of competent jurisdiction to recover the amount so paid. The only trouble with this regulation construing Section 76 (b) is that it authorized a suit to be brought upon the mere filing of a claim for refund with the Treasurer rather than after an appeal to the Board of Review and Equalization. The regulation expressly recognizes that in such [fol. 33] case payment under protest is not necessary. Its only defect, as we view it, is in failing to give effect to the express language of Section 76 (b) which calls not only for the presentation of a claim for refund to the Treasurer but also to the Board of Review and Equalization on appeal.

Section 55 provides, in substance, that if the taxpayer has paid more than the amount of the tax "determined" to be correct (that is, determined by the Treasurer and Board of Review and Equalization on appeal) the excess over the amount so determined "shall be credited or refunded" as provided in Section 64; and Section 64 (a) provides that where such an overpayment has been made "the amount of such overpayment shall be credited against any income or excess-profits tax or installment thereof then due

from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer." Section 75 authorizes the Treasurer "to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, or penalties collected without authority, and all taxes that appear to be unjustly assessed and excessive in amount, or in any manner wrongfully collected."

It thus appears that Section 76 (b) was intended to authorize the maintenance of a suit against the Treasurer, in case he refused to pay back the illegal or excessive tax collected, as he was authorized and directed to do under Sections 75, 55, and 64. It certainly could not have been the intention of the law maker to leave the payment of the taxpayer's just claim solely to the whim of the Treasurer.

In fact we fail to see how the law-making body could have enacted Section 76 (b) with any other purpose in view than as authorizing a suit (conditioned as above stated) in case the Treasurer refused payment.

In these cases the court below did not attempt to give any rational meaning or construction to the provisions of 76 (b) but treated the cases as though no such provision as Section 76 (b) existed; and, having wiped the Section off the statute book, and failed to recognize any distinction between a suit to recover a refund and one to test the validity of a deficiency assessment, it held that the former [fol. 34] could not be maintained unless the tax was paid under protest, as required by 76 (a) in the case of deficiency assessments.

We think this holding is manifestly wrong; that Section 76 (a) and 76 (b) relate to distinct matters and that the provision for payment under protest in Section 76 (a) applies only to suits for the recovery of deficiency assessments to which the provisions of 76 (a) relate.

We do, however, think that the provision in Section 76 (b) requiring an appeal to the Board of Review and Equalization is a condition precedent to the maintenance of a suit under that section and the Fertilizer Company not having taken such an appeal cannot maintain its suit.

In No. 3274 the judgment of the Supreme Court of Puerto Rico is affirmed.

In No. 3285 the judgment of the Supreme Court of Puerto Rico is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

CONCURRING OPINION

WILSON, J. (concurring):

I concur in the result of the opinions of Judge Bingham in these cases on the grounds set forth below.

The two cases present somewhat different state of facts, but involve similar questions and the same sections of Act 74 of the Laws of 1925 of Puerto Rico, hereinafter referred to as the Act, relating to income taxes, and may be disposed of in one opinion.

The intent of the statute, though inartistically worded in some particulars, is clear when considered in its entirety. Substantially all income and excess-profits taxes are without doubt paid voluntarily on their due date, without the necessity of levy, assessment or any other kind of action on the part of the Treasurer or Collector. That is what the Legislature intended. It is the procedure adopted by the Federal Income Tax laws, and is of substantial benefit to the public treasury, making available for public purposes [fol. 35] ascertainable income at definite dates, which taxpayers must pay or become liable for penalties and interest.

Neither the treasury department nor the taxpayers are, however, infallible upon a complicated subject such as income taxes, and the Treasurer of Puerto Rico is required as soon as is practicable to examine the taxpayer's return and determine whether he has paid the correct amount of tax. The law contemplates that overpayments made by the taxpayer shall be returned, and that underpayments shall be collected. The Act sets up a procedure by which the taxpayer can compel the return of overpayments, and by which the Treasurer can compel the payment of the correct amount of the tax in case of underpayments.

The intention of the Legislature to encourage taxpayers to pay what they think is owing, upon the assurance that it will be refunded if found to be in excess of what is properly due, is manifest from the Act, and the requirement for payment under protest as a condition precedent for a suit to recover is limited only to those cases in which the taxpayer has been put upon notice by receipt of a notice of deficiency and that his determination of his own tax has been contested.

The statute should be interpreted with this intent in mind.

The plaintiff in the first case, the Porto Rico Fertilizer

Company, hereinafter referred to as the Fertilizer Company, filed a return for the several years from 1924 to 1931, both inclusive, showing interest paid each year on money borrowed of a Virginia corporation and used in Virginia or other places in the United States for the purchase of materials to be used in its business.

The petition of the taxpayer alleged that the Treasurer of Puerto Rico notified the plaintiff that he had assessed against the plaintiff according to its returns the several amounts provided by the Act, which it paid voluntarily and without protests as a withholding company for the Virginia company (Sec. 22). The defendant demurred to the petition.

Eight actions were brought by the Fertilizer Company against the Treasurer of Puerto Rico to recover the sums illegally collected by him for the several years in question, [fol. 36] but abandoned its first five causes of action as being prescribed by Section 64 (b) of the Act.

The District Court of San Juan held that, since the taxes were not paid under protest, as provided in Section 76 (a) of the Act, as a condition of bringing suit against the Treasurer, and as no appeal had been taken to the Bureau of Review and Equalization from the refusal of the Treasurer to refund the sum erroneously collected, the plaintiff could not recover.

On appeal to the Supreme Court of Puerto Rico, that Court sustained the judgment of the District Court. "For the reason that the payment was not made under protest, and no appeal was taken to the Board of Review and Equalization, the judgment appealed from should be affirmed."

Since the cases were presented on demurrer, the allegations of the complaints must be taken as containing all the facts. It is alleged in the Fertilizer case that the Treasurer notified the taxpayer that he had assessed the taxes therein set forth. The sums alleged as assessed were voluntarily paid and without protest, though the statute imposing the taxes in December, 1932, was held by this Court to be invalid under the Organic Act of Puerto Rico, as imposing taxes on non-residents upon income outside the Island. *Domenech v. United Porto Rican Sugar Co.*, 62 Fed. (2d) 552.

It is clear that the sums so paid were not in the nature of deficiency taxes under Sections 56 and 57 of the Act, but may be treated as an overpayment under Sections 23(b) and 64 of the Act. The plaintiff requested that the sums

aid by it be refunded, presumably under Section 75 of the Act, which was refused by the Treasurer, but the plaintiff did not appeal therefrom to the Board of Review and Equalization.

While the Income Tax Acts of 1919 and 1921, when examined in their entirety, were also intended to provide for the assessment, payment, and the determination of income taxes by the Treasurer, and an adjustment of any differences by an appeal to a Board of Review and Equalization, and an appeal to the Courts, see Sections 57-63, and Section 66 of the 1919 Act, and Sections 42-47 of the 1921 Act. The [fol. 37] Legislature by the Act of 1925 attempted to clarify certain provisions of the prior Acts.

However, the procedure under the Income Tax Act of 1919, 1921 and 1925 has been so confused by the decisions of the Supreme Court of Puerto Rico that, while ordinarily this Court will follow the interpretation of the law of Puerto Rico by the Insular Supreme Court, we think we are warranted in determining, without regard to the many conflicting decisions of the Insular Supreme Court, what seems to us to be the intent of the Insular Legislature in the passage of Act 74 of the Laws of 1925 so far as it affects the decision of these cases.

Sections 22, 27 (a), 37 (a) 39, 53, 54, 55, 56, 57, 64, 75 and 76 of the Act of 1925 are clearly intended to provide for returns by taxpayers (Secs. 22, 37); the voluntary payment by the taxpayer of the tax provided by law according to his return within a specified time (Sec. 53); the examination of his return by the Treasurer (Sec. 54); and if he finds on examination of the return, or from any additional evidence, that the sum voluntarily paid by the taxpayer was less than the amount due from the taxpayer, the Treasurer then notified the taxpayer of the determination of a deficiency tax (Sec. 57); and if he finds that the taxpayer has overpaid the sum due from him (Secs. 55, 64), any such overpayment shall be refunded immediately to the taxpayer.

In case the Treasurer, upon the examination of a return, finds that the sum paid by the taxpayer is less than the sum due from him as taxes under the Act, and determines that a deficiency exists and notifies the taxpayer of such deficiency, the taxpayer may, within thirty days, file an appeal with the Board of Review and Equalization (Sec. 57(a)), the decision of which is final. The amount so determined

by the Board shall be assessed by the Treasurer (Sec. 57 (b)).

In case an overpayment is not refunded as provided in Section 23(b) and 64, and the taxpayer under Section 75 applies to the Treasurer, who is authorized to make the refund, and the Treasurer refuses for any reason, as in case a dispute exists as to the amount of the overpayment, the taxpayer under Section 76 (b) may appeal to the Board [fol. 38] of Review and Equalization, and if the Board of Review finds that there was an overpayment and the Treasurer still refuses to refund the amount of overpayment determined by the Board, it is clear, we think, that a suit may be brought to recover.

It is clear that the Fertilizer Company neither paid under protest the taxes involved in the action brought by it, nor did it appeal from the Treasurer's refusal to make a refund to the Board of Review. It had a remedy at law, if it had followed the provisions of the Act. Mandamus does not lie to compel action by an official where the law provides a remedy.

The Treasurer, however, without warrant of a legal statute, collected the taxes for the years 1929, 1930 and 1931; as a result an action at law existed against the Treasurer, *Jimenez v. Domenech*, 80 Fed. (2d) 767, 768, for money had and received, which appears to be provided for in Sections 1795-1801 of the Civil Code of Puerto Rico. Also see *Sage et al. v. United States*, 250 U. S. 33; *George Moore Ice Cream Co., Inc. v. Rose, Collector*, 289 U. S. 373; *United States v. Hvoslef*, 237 U. S. 1.

The plaintiff's present action is, however, based on Act 74 of the Laws of 1925, and since it has not complied with its provisions, the judgment of the Supreme Court of Puerto must be affirmed with costs, not to include counsel fees.

The case of the Yabucoa Sugar Company, hereinafter referred to as the Sugar Company, presents a somewhat different state of facts from that in the case brought by the Fertilizer Company.

From the complaint in this case, to which a demurrer was filed by the defendant, it appears that on the return of the plaintiff filed with the Treasurer, no tax was at first assessed against the plaintiff, but the plaintiff at the request of the Treasurer voluntarily paid the amount due according to the return. Later the Treasurer, having practiced an investigation of the books of account of the Yabucoa

ugar Company, a notice of a deficiency tax of \$1,301.51 was prepared by the Treasurer and was served on the plaintiff October 31, 1928.

From this notice of a deficiency tax the plaintiff appealed to the Board of Review and Equalization, which found that [fol. 39] there was no deficiency but an overpayment by the plaintiff of \$6,803.66, which was made at the request of the Treasurer on its original return. The plaintiff then filed a petition with the Treasurer for refund and credit, who granted a refund of \$525.56 instead of the amount found to have been overpaid by the Board of Review; whereupon the plaintiff again appealed from the decision of the Treasurer to the Board of Review. The Board confirmed its prior decision on the former appeal, whereupon the plaintiff brought this action to recover of the Treasurer the sum found to have been overpaid by the Board of Review and Equalization.

The District Court of San Juan held that, inasmuch as the taxes involved were not paid under protest, no recovery could be had. The Supreme Court on appeal affirmed the judgment of the District Court and held that under Section 75 of the Act of 1925, the Treasurer having refused to make the refund, there was no redress for the taxpayer by applying to the courts; that Section 75 gave to the Treasurer sole discretion as to whether he would allow a refund in any case. We think this interpretation of Section 75 is not warranted. Section 64 requires a refund of any overpayment. No discretion is imposed in the Treasurer as to whether he will grant it or not. In case a question is raised as to the amount of the overpayment, the Treasurer may refuse to grant a refund according to the plaintiff's claim, but the taxpayer may appeal to the Board of Review, the decision of which is final, which was done in this case.

There appears to be no question but that the plaintiff has complied with all the necessary requirements of the Act, including Section 76 (b), for bringing a suit to recover the overpayment found by the Board of Review.

It had the right of appeal to the Board of Review on two grounds: (1) from the decision of the Treasurer refusing to grant a refund of the overpayment, and (2) from the Treasurer's determination of a deficiency tax of \$1,301.51. Section 76 (b) clearly implies that a suit may be brought to recover any sum found to be due by the Board of Review as an overpayment.

Since the Board found that no deficiency tax was due [fol. 40] and its decision is final, there was no occasion for the plaintiff to pay under protest the sum levied by the Treasurer as a deficiency tax. Any other interpretation of the Act permits no effect to be given to Section 76 (b), or to the provisions of Section 64, which provides that all overpayments, after crediting the amount to any other tax due for a different year, shall be returned to the taxpayer.

It is unnecessary to consider the effect of Act 8 of the Laws of 1927, since the Supreme Court of Puerto Rico has finally concluded that that Act, as this Court indicated in its opinion in *Domenech v. Verges*, 69 Fed. (2d) 714, 716, in no way modified or repeals any provision of the Act of 1925, which is a complete Act in itself for the assessment and collection of income taxes.

DISSENTING OPINION

MORTON, J. (dissenting):

There is no disagreement as to the general scheme of the statute under discussion. Income taxes imposed by it fall into two classes (1) those shown to be due on the face of the return, and paid voluntarily without objection or protest, (2) those collected on deficiency assessments. In regard to the latter there are careful and adequate provisions. (Sections 57 and 76 (a).) If deficiency assessments are objected to the taxpayer may appeal to the Board of Review; if the Board of Review decides against him he must pay, and may sue in the courts to recover back the alleged illegal exaction.

The present case does not relate to deficiency taxes; it concerns only taxes which were voluntarily paid without protest and deals only with claims for refund. The statute provides very specifically for the return of overpayments without any requirement of objection or protest against the original payment. (Sections 53, 64.) These sections apply to voluntary overpayments, made presumably by mistake on the part of the taxpayer. It also authorizes and directs the Treasurer to repay erroneous or illegal collections and to report annually to the Legislature his transactions under this authority. (Section 75.) While no express provision is [fol. 41] made therefor it is not doubted that a person who

has voluntarily overpaid his tax may apply to the Treasurer under these sections for a refund; and it is clearly the Treasurer's duty if overpayment is established to make a proper refund. The crucial question is who is to determine whether there has been overpayment of a tax voluntarily paid, i. e. to pass on such claims for refund.

The statute makes only one reference to them. (Section 76 (b)*). The present case involves the correct construction of this subsection. At first reading it appears to be a limitation or restriction on suits for the recovery of overpayments, already authorized elsewhere in the statute. It says in effect that no suit shall be maintained in any court until a claim for refund shall have been filed with the Treasurer and on appeal with the Board of Review "*according to the provisions of law in that regard and the regulations established in pursuance thereof.*" The difficulty is that there are no provisions of law authorizing suits in court for the recovery of taxes voluntarily paid or empowering the Board of Review to deal with claims for refund on appeal from the Treasurer, or with taxes which have been paid. I agree with my brother Bingham that section 76 (a) relates only to deficiency assessments and payments, and is of no assistance. The reference to suits in court and to appeals to the Board of Review although in the negative form might possibly have been construed as conferring by implication the jurisdiction now held to exist in the Board of Review and in the Courts if these references had not been limited as they are very expressly by the last clause in the sub-section. It seems clear that provisions assumed to be in the statute are absent. My brethren elaborate 76 (b) to include by [fol. 42] construction what they suppose the omitted provisions to have been. Even so there remain unsolved diffi-

* "No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

culties. If the Board of Review decides in favor of the taxpayer what happens? The Supreme Court of Puerto Rico evidently felt that the mistake was the other way, i. e. in allowing section 76 (b) to stand, when the provisions to which it refers were elided. The Supreme Court accordingly held that with respect to voluntary overpayments the taxpayer was in the hands of the Treasurer on matters of refund, "if the decision of the Treasurer is against him he cannot appeal from the same to Courts of justice." This does not seem to me an unreasonable solution of the difficulty which confronted them. Indeed I incline to think it was right. Under the view, taken in the majority opinions, every tax which has been voluntarily paid without protest may be reopened on claims for refund at any time within four years and resettled de novo in court proceedings. This is in fact what is approved by the decision in the Yabucoa Sugar case before us. Greater consideration is shown to voluntary overpayments than to deficiency assessments. This certainly is a wide departure from the view of the Supreme Court of Puerto Rico. It has often been said that in matters of local law the opinion of that court is not to be set aside unless clearly wrong. As I have said I incline to think the Supreme Court of Puerto Rico was right; I certainly do not think it was clearly wrong.

In the Fertilizer Company case there was clearly an overpayment of tax which it was the Treasurer's duty to recognize and refund. His refusal to do so is on the facts before us a clear breach of his statutory duty. No attempt is made to defend it. The Fertilizer Company had no right to bring suit on its claim for refund. Its remedy appears to be a suit against the Treasurer for mandamus to compel him to perform his statutory duty. *Lane v. Hoglund*, 244 U. S. 174; *Dismuke v. United States*, 297 U. S. 167.

In the Sugar Company case the claim for refund rested on changes in income or deductions made by the taxpayer after the tax had been voluntarily paid. They were not approved by the Treasurer. It does not appear that the Sugar Company's claim was established beyond fair doubt nor that it was clearly the duty of the Treasurer to accept it.

I think both judgments should be affirmed. In the case of the Fertilizer Company with leave to bring further proceedings by mandamus or otherwise as advised.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—July 13, 1938

This cause came on to be heard January 26, 1938, upon the transcript of record of the Supreme Court of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now, to wit, July 13, 1938, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is vacated and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur I. Charron, Clerk.

[fol. 44] Thereafter, to wit, on August 13, 1938, mandate issued to the Supreme Court of Puerto Rico.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is Ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby extended for a period of fifty (50) days from October 13, 1938.

Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

Dated this 6th day of October, 1938.

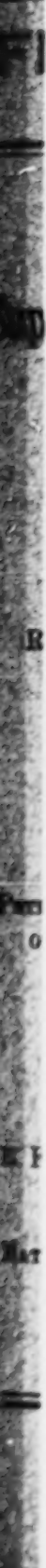
[fol. 46] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 30, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter William Cattron Rigby. File No. 42,983. U. S. Circuit Court of Appeals, First Circuit. Term No. 498. Rafael Sancho Bonet, Treasurer of Puerto Rico, petitioner, vs. Yabucoa Sugar Company. Petition for a writ of certiorari and exhibit thereto. Filed December 2, 1938. Term No. 498, O. T., 1938.



R

0

K F

M 17

MICROCARD

TRADE MARK 

22



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHE
201 TWENTY-SIXTH STREET, N.W. WASHINGTON, D.C. 20037 PHONE 202 333-6393

376

38-99



FILE COPY

Office - Supreme Court, U. S.

FILED

DEC 2 1938

CHARLES ELMORE CRISLEY

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

VS.

YABUCOA SUGAR COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT
OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico.

NATHAN R. MARGOLD,
*Solicitor for the Department of the Interior,
Of Counsel.*

5

4

- Point II—The negative prohibitory language of section 76(b) of the Puerto Rican Income Tax Act of 1925 does not evidence any intent on the part of the Legislature thereby to make any affirmative grants of power either (a) to the Board of Review and Equalization to entertain any appeals or to bind the Treasurer by its decisions in any cases other than those relating to deficiency taxes assessed by the Treasurer, or (b) to grant to the taxpayers any recourse to the courts, or to the courts any jurisdiction to entertain taxpayers' suits, to review the Treasurer's determinations of the correct amount of the tax, in any cases other than those relating to "deficiency taxes" 24-26
- Point III—It is particularly significant of the intent of the Legislature of Puerto Rico not to permit any recourse to the courts from the Treasurer's determination of the correct amount of the tax (or any appeal to the Board of Review and Equalization), except in cases relating to deficiency taxes, that, in drafting sections 75 and 76(b) of the Act of 1925, it entirely omitted provisions appearing in cognate sections of the earlier Puerto Rican Act of 1919, and of the federal Revenue Act of 1924, respectively, upon which these Sections 75 and 76(b) are otherwise closely modeled, and which would have permitted recourse to the courts from all tax determinations of the Treasurer, had the Legislature seen fit to follow them in drafting this Act of 1925 27-32
- Point IV—The opinions of the majority members of the Circuit Court of Appeals err in failing to apply here the established rule that the decision of a Territorial Su-

preme Court, such as the Supreme Court of Puerto Rico, construing a local statute of the Territory, will be followed unless "clearly erroneous"; and further err in failing to recognize that the decision of the Supreme Court of Puerto Rico in this case was, in any event, *not* "clearly erroneous", and, therefore, should have been followed, under this rule 32-34

Point V—The opinions of the majority of the Circuit Court of Appeals err in overlooking or ignoring the *second question* presented on the record in this case . . . 34-35

CONCLUSION 35

APPENDICES 37-54

Appendix I—Pertinent Sections of Puerto Rican "Income Tax Act of 1924", Act of August 6, 1925, and of Acts of 1919 and 1921 37-49

Appendix II—Section 1014 of Federal "Revenue Act of 1924", Act of June 2, 1924 . . . 49

Appendix III—Pertinent portion of opinion of Supreme Court of Puerto Rico in the *Fertilizer Company* case 50-54

TABLE OF CASES

American Colonial Bank v. Domenech, Treasurer, 43 P. R. Dec. 889	52
Cardona v. Quinones, 240 U. S. 83	33
Chesebrough v. United States, 192 U. S. 253	24
Compania Agrícola de Cayey, Ltd. v. Domenech, Treasurer, 47 P. R. Dec., 535 (Spanish ed.) 13,14,28,29,32-33,35,52	
Curtis' Adm'x. v. Fiedler, 2 Black 461	24

	Page
De Villaneuva v. Villaneuva, 239 U. S. 293	33
Dismuke v. United States, 297 U. S. 167	19,20,23
Domenech v. Verges, 69 F. (2d) 714	33
Elliott v. Swartwout, 10 Pet. 137	24
Loiza Sugar Co. v. People of Puerto Rico, 57 F. (2d) 705	33
Little v. Bowers, 134 U. S. 547	14,19,20,24
Moore Ice Cream Co. v. Rose, 289 U. S. 373 ..	19,20,24,32
McCormick v. Bonner, Treasurer, 44 P. R. Dec. 432 (Spanish ed.)	28,53
People of Puerto Rico v. Shell Co., 302 U. S. 253	19,20,24
People of Puerto Rico v. Rosaly, 227 U. S. 270 ..	19,20,23
Porto Rico Coal Co. v. Domenech, 41 F. (2d) 183 ..	33
Porto Rico Fertilizer Co. v. Rafael Sancho Bonet, Treasurer, (No. 3274, Circuit Court of Appeals), and opinion of insular Supreme Court 1,2,8,13, <i>et seq.</i> , and Appendix III, 49-53	
Richardson v. Fajardo Sugar Co., 237 Fed. 195 ..	33
Russell & Co. v. Sancho Bonet, Treasurer, 92 F. (2d) 821	33
Serrallés v. Treasurer, 30 P. R. Rep. 220	28,53
United States v. Babcock, 250 U. S. 328	22
United States v. N. Y. & Cuba Mail S.S. Co., 200 U. S. 488	24

STATUTES

	Page
FEDERAL	
Act of Congress of April 12, 1900, "Foraker Act"	24
Act of Congress of March 2, 1917, "Organic Act"	24
"Revenue Act of 1924", Act of June 2, 1924	
Sec. 1014 (a) (Sec. 3226, Rev. Stats)	
30-31, and Appendix II,	49
PUERTO RICO	
Act No. 80, Income Tax Act of 1919	
Sec. 66	27-29, 31-32, and Appendix I, 48-49
Act No. 43, Income Tax Act of 1921	
Sec. 63	27-29, and Appendix I, 49
Act No. 74, Income Tax Act of August 6, 1925 (the so-called "Income Tax Act of 1924")	
Secs. 22 and 23	Appendix I, 37-38
Secs. 24-27	3
Sec. 27(a)	Appendix I, 38-39
Secs. 37-45	3
Sec. 37(a)	Appendix I, 39-40
Sec. 39 (a), (b)	Appendix I, 40
Sec. 53	4, and Appendix I, 40-44
Secs. 54, 55, 56, and 57	
2, 4, 7, <i>et seq.</i> , and Appendix I,	41-42
Secs. 58 and 59	4, <i>et seq.</i>
Sec. 60	4, <i>et seq.</i> , and Appendix I, 43
Secs. 62 and 63	4
Sec. 64	2, 5, 7, <i>et seq.</i> , and Appendix I, 43-45
Sec. 65	5, and Appendix I, 45-47
Secs. 66 and 67	5
Sec. 68	5, and Appendix I, 47
Secs. 69-74	5
Sec. 75	2, 5, 7, <i>et seq.</i> , and Appendix I, 47
Sec. 76 (a), (b)	
6-7, 8, <i>et seq.</i> , and Appendix I,	47-48



IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

vs.

YABUCOA SUGAR COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT
OF APPEALS, FIRST CIRCUIT

*To the Honorable, The Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Petitioner, Rafael Sancho Bonet, Treasurer of Puerto Rico, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit, entered July 13, 1938, vacating the judgment of the Supreme Court of Puerto Rico and remanding the case for further proceedings not inconsistent with the opinion of the Circuit Court of Appeals.

The decision of the Circuit Court of Appeals was by a divided court. Each of the three Judges wrote a separate opinion covering this case and the companion case of *Porto Rico Fertilizer Co. vs. Rafael Sancho Bonet, Treasurer of Puerto Rico*, No. 3274 in that court, but PRESIDING JUDGE BINGHAM and JUDGE WILSON concur in the

result of affirming the judgment of the Supreme Court of Puerto Rico in the *Fertilizer* case, although reversing it in this case, while JUDGE MORTON concurred in affirming the judgment in the *Fertilizer* case, but dissented from the reversal in this case, holding that both judgments should be affirmed.

Both cases were actions at law to recover supposed over-payments of income taxes paid voluntarily and without protest upon plaintiffs' own original income tax returns under the Puerto Rican Income Tax Act of 1925. They differed in that the *Fertilizer Company* had not sought an appeal from the insular Treasurer's determination to the Board of Review and Equalization; whereas the present respondent, the sugar company, had done so. JUDGE BINGHAM says (R. 31): "In no other particular do the rights of the plaintiffs to maintain their causes of complaint differ".

This petitioner believes that the opinion of JUDGE MORTON is correct, and that the judgment of the Supreme Court of Puerto Rico (affirming that of the District Court) should have been affirmed in this case, as well as in the *Fertilizer* case.

QUESTIONS PRESENTED

The primary question is whether a taxpayer may maintain an action in court under the Income Tax Law of Puerto Rico against the Treasurer for a refund of supposed over-payments of income taxes paid voluntarily and without protest in accordance with the taxpayer's own income tax return, or whether, upon a request or petition for such a refund the taxpayer is concluded by the Treasurer's "determination" of the "correct amount of the tax", and of the refund, if any, to be made, under sections 54, 55, 64, and 75 of the Income Tax Act.

A second question is whether the Board of Review and Equalization has any jurisdiction to review and to bind the Treasurer by its decision on such a question of voluntary payments without protest; or whether its jurisdic-

tion, and its power to bind the Treasurer by its decisions, is not limited to determining, solely, questions relating to **deficiency taxes** assessed by the Treasurer.

This petitioner believes that the primary question should be answered in the affirmative, and the second question in the negative; that is to say, that the taxpayer is finally concluded by the Treasurer's determination of the correct amount of the tax due, upon a petition for refund of taxes voluntarily paid without any protest in accordance with the taxpayer's own calculation of the tax upon his own tax return; and, second, that, upon such a question, the Board of Review and Equalization has no jurisdiction and no power to bind the Treasurer by its decision,—that its jurisdiction is limited solely to questions of the validity and amount of deficiency taxes assessed by the Treasurer.

This position is in accordance with the decisions of the insular courts, the District Court and the Supreme Court of Puerto Rico, in the present and earlier cases, and with the dissenting opinion of JUDGE MORTON in the Circuit Court of Appeals.

But JUDGES BINGHAM and WILSON hold the contrary, although in separate opinions, in which, however, they concur in their results.

STATUTES

Pertinent provisions of the Income Tax Act of Puerto Rico of August 6, 1925 (the so-called "Income Tax Act of 1924", as it is styled by section 1 of the Act) are in the Appendix, together with a few pertinent sections of the earlier Income Tax Acts of Puerto Rico of 1919 and 1921, and of the federal revenue laws.

Sections 24 to 27 of the Income Tax Act of 1925 provide for income tax returns to the Treasurer by individual taxpayers and fiduciaries, and sections 37 to 45 for returns by corporations, partnerships, and insurance companies.

Section 53 (Appendix, *infra*, pp. 40-41) provides for payment by the taxpayer (with some exceptions not pertinent here) on or before the 15th day of March (or of the third month following the close of the taxpayer's fiscal year), with a privilege of payment in two installments, and provisions allowing some further extension in some circumstances.

Section 54, entitled "Examination of Return and Determination of Tax", provides (Appendix, *infra*, p. 41) that, "as soon as practicable after the return is filed",

"the Treasurer shall examine it and shall determine the correct amount of the tax".

Section 55, entitled "Overpayments", provides (Appendix, *infra*, p. 41):

"If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 64."

Sections 56, 57, and 58 relate to "Deficiency Taxes" to be assessed by the Treasurer in case the taxpayer's return does not show any amount as the tax to be paid, or shows an amount less than the Treasurer "determines" that the tax should be, and for taxpayers' appeals to the Board of Review and Equalization from the Treasurer's determinations of such deficiency taxes; Section 59 deals with "Additions to the tax in cases of delinquency"; Section 60 with periods of limitation of time on the assessment of taxes; Section 62 with "Claims in Abatement" of "deficiency taxes" assessed by the Treasurer under section 57; and Section 63 with "Taxes under prior Acts" [not here involved].

Section 64, entitled "Credits and Refunds" (Appendix, *infra*, pp. 43-45) provides:

“(a) Where there has been an overpayment of any income or excess-profits tax imposed by this Act, or by Income Tax Act No. 59 of 1917, Income Tax Act No. 80 of 1919, and Income Tax Act No. 43 of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.”

Paragraph (b) of Section 64 allows a claim for such a credit or refund to be filed at any time within *four years* from the time the tax was paid.

Section 65 relates to taxpayers intending to depart from Puerto Rico; section 66 directs the Act to take effect retroactively as of January 1, 1924; section 67 makes certain “administrative, special, or stamp provisions of law” applicable in administering the Act; and section 68 (Appendix, *infra*, p. 47) authorizes the Treasurer to prescribe “all needful rules and regulations for the enforcement of this Act”.

Section 69 requires taxpayers to keep records; sections 70, 71, and 72 deal with failure to make returns, false or fraudulent returns, and examinations of taxpayers’ records by the Treasurer; section 73 with payments made upon compromise agreements; and section 74 with “retroactive regulations”. None of these matters are here involved.

Section 75, entitled “Refunds”, provides (Appendix, *infra*, p. 47):

“The Treasurer is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to The Legislature of Porto Rico at the beginning of each regular session of all transactions under this section.”

Section 76 is entitled "**Limitations upon Suits and Proceedings by the Taxpayer**". It provides: (Appendix, *infra*, pp. 47-48):

"Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Porto Rico.

"Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence, and the hearing shall be set promptly for final decision.

"If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case sufficient legal grounds and facts for applying again to the Board for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of Porto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

"(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions

of law in that regard, and the regulations established in pursuance thereof.

“(c) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.”

BEARING OF THE STATUTES ON THIS CASE

The controversy here centers principally around the application of sections 54, 55, 64, 75, and 76, *supra*, of the Act of 1925.

It is perfectly plain that, as JUDGE MORTON said in his opinion in the Circuit Court of Appeals (R. 40-41):

“There is no disagreement as to the general scheme of the statute under discussion. Income taxes imposed by it fall into two classes (1) those shown to be due on the face of the return, and paid voluntarily without objection or protest, (2) those collected on deficiency assessments. In regard to the latter there are careful and adequate provisions. (Sections 57 and 76(a).) If deficiency assessments are objected to the taxpayer may appeal to the Board of Review; if the Board of Review decides against him he must pay, and may sue in the courts to recover back the alleged illegal exaction.

“The present case does not relate to deficiency taxes; it concerns only taxes which were voluntarily paid without protest and deals only with claims for refund. The statute provides very specifically for the return of overpayments without any requirement of objection or protest against the original payment. (Sections 53,¹ 64). These sections apply to voluntary overpayments, made presumably by mistake on the part of the taxpayer. It also authorizes and directs the Treasurer to repay erroneous or illegal collections and to report annually to the Legislature his transactions under this authority. (Section 75).

While no express provision is made therefor it is not

¹The figure “53” is manifestly a clerical error. This should read: “(Sections 55, 64).” *Confer* Appendix, *infra*, pp. 40-41.

doubted that a person who has voluntarily overpaid his tax may apply to the Treasurer under these sections for a refund; and it is clearly the Treasurer's duty if overpayment is established to make a proper refund. The crucial question is who is to determine whether there has been overpayment of a tax voluntarily paid, i.e. to pass on such claims for refund."

The Supreme Court of Puerto Rico held (R. 23-24), following its own prior decisions in the *Fertilizer* case, *supra*, and in an earlier case, that, on such a claim, the Treasurer's "determination" of the amount of the tax, under sections 54, 55, 64, and 75, was conclusive, and [in the absence of fraud or wilful abuse of discretion, not here involved] could not be reviewed by the courts.

JUDGE MORTON agrees (R. 41-42); and, calling attention to the fact that what is here involved is a question of the construction of a local Territorial statute by the local Territorial Supreme Court, adds (R. 42):

"It has often been said that in matters of local law the opinion of that court is not to be set aside unless clearly wrong. As I have said I incline to think the Supreme Court of Puerto Rico was right; I certainly do not think it was clearly wrong."

He holds (R. 41-42) that section 76(b) has no application here.

To the contrary, JUDGES BINGHAM and WILSON find (R. 32-34, and 37-40) in section 76(b) grants of authority, both: (a) To the taxpayer, to appeal to the Board of Review and Equalization from the Treasurer's determination in such a case, and for the board to entertain the appeal, and to bind the Treasurer by its decision; and (b) To the courts, to entertain an action by the taxpayer to review the Treasurer's determination.

As above stated, this petitioner, the Treasurer of Puerto Rico, believes that JUDGES BINGHAM and WILSON are in error in this holding; and that JUDGE MORTON is

right in agreeing with the unanimous decision of the Justices of the Supreme Court of Puerto Rico.

STATEMENT OF THE CASE

This was an appeal by the plaintiff-respondent sugar company to the Circuit Court of Appeals from a judgment of the Supreme Court of Puerto Rico dismissing the company's appeal from the insular District Court of San Juan and affirming the judgment of the District Court on the ground that the sole question involved in this suit had already been decisively determined adversely to the plaintiff company's contentions in earlier decisions of the insular Supreme Court, followed in the present case (R. 18).

The company, a corporation of Puerto Rico, brought this suit against the insular Treasurer,² in the insular District Court of San Juan, for refund of a supposed over-payment of \$6803.66 alleged to have been voluntarily over-paid by it by mistake in paying to the insular Treasury \$25,234.92 on the company's own tax return for its insular income taxes for its fiscal year 1927, under the Puerto Rican Income Tax Act of 1925.³ Later on, the Treasurer assessed a "deficiency tax" of

² *As Treasurer*; not against him individually. The suit was originally brought against the former Treasurer, Manuel V. Domenech (R. 1-2); but his successor in office, the present Treasurer RAFAEL SANCHO BONET, was afterwards substituted as defendant (R. 27).

³ Act No. 74 approved August 6, 1925 (Laws of Puerto Rico, 1925, pp. 400-550). The nomenclature is confusing, because Section 1 of the Act provides (Laws of 1925, p. 400):

This Act shall be known as the "Income Tax Act of 1924".

To avoid confusion, it will be referred to throughout this Petition and the Supporting Brief as the "Act of 1925", or as the "Income Tax Act of 1925". There is no other "Income Tax Act of 1924" of Puerto Rico.

\$1301.51, from which the company appealed to the Board of Review and Equalization which overruled the Treasurer as to the "deficiency tax," *and also found that the company had in fact over-paid the Treasury \$6803.66 in making its original income tax payment ("Amended Complaint", R. 2-6).* It appears ("*Amended Complaint*", Pars. VII to X; R. 4-6) that the Board differed in opinion, both from the Treasurer and from the sugar company, as to the amount of the credit to be allowed the company on its item of "Repairs", for the preceding year 1926, carried over to the year here in question, of 1927.

No facts are alleged in the "Amended Complaint" from which it is possible to draw any independent conclusion as to the correctness of the decision of the Board of Review and Equalization, or as to whether the taxpayer itself was not really correct in its original calculation upon which it had made its own voluntary tax payment, or as to whether the Treasurer was not correct either in his original determination upon which he assessed the deficiency tax, or as to his second determination, after the first decision of the Board, in which he receded from the deficiency tax and determined that a refund of \$525.56,—but of that amount only,—was due the company, as hereafter stated. The "*Amended Complaint*" contains no allegations as to the character of the "Repairs" involved. It relies wholly upon an assumption that the Treasurer was bound by the decision of the Board, not only as to the deficiency tax, but also as to the supposed voluntary over-payment by the taxpayer upon the face of its own original tax return.

⁴ Nor appear anywhere else in the record; because the Treasurer's demurrer to the "*Amended Complaint*" was sustained by the District Court, and the sugar company elected not to amend, but to appeal directly to the insular Supreme Court (R. 8, 10, 17).

It is alleged ("*Amended Complaint*", Par. XI; R. 6) that, after the Board's first decision, the plaintiff sugar company, in February, 1930, filed with the Treasurer "a petition for refund or credit", which was decided by the Treasurer the following month, March 28, 1930,

"by granting to the plaintiff a credit or refund in the amount of \$525.56, instead of the sum claimed by the plaintiff in accordance with the above ruling of the Board of Review and Equalization";

that (Par. XII; R. 6) the plaintiff sugar company, the next month, in April, 1930, took a second appeal to the Board from this decision of the Treasurer on its petition for refund or credit; and that the board, more than two years later, on August 22, 1932, decided that second appeal, "by affirming its original ruling of December 23, 1929, entered in the appeal taken with regard to the deficiency".

The plaintiff's claim is ("*Amended Complaint*", Par. XIII; R. 6) that the Treasurer "in granting to the plaintiff a refund for taxes in the amount of \$525.56, plus \$60.21 for interest, instead of \$6803.66, plus the interest claimed by the plaintiff, has done so in an arbitrary, unlawful, capricious and wilful manner, and without any authority or power to do so, thus altering and modifying the ruling of the Board of Review and Equalization and disobeying the terms of said ruling".

As above stated, there are no allegations of facts upon which any independent determination can be based as to the correctness of the calculations of the several parties—the Board, or the Treasurer, or the plaintiff itself upon its original payment on the face of its own tax return,—as to the item of the plaintiff's "Repairs" for the preceding year of 1926, upon which their ideas differ.

The "*Amended Complaint*" is based wholly upon the assumption that the Treasurer was bound by the deci-

sion of the Board,—not only as to the deficiency tax, but also as to the petition for refund of the supposed over-payment voluntarily made in the original payment of the tax without protest in accordance with plaintiff's own income tax return; and that the Treasurer, in "disobeying" the terms of the Board's ruling, necessarily, as a matter of law, acted "in an arbitrary, unlawful, capricious and wilful manner, and without any authority or power to do so" (*"Amended Complaint"*, Par. XIII, *supra*, R. 6).

It is not alleged that the Plaintiff sugar company made any second request or petition to the Treasurer for refund or credit in accordance with the Board's ruling, after the Board's second decision of August 22, 1932. The company appears directly to have begun this suit against the Treasurer for the amount of the refund which the Board thought due it.⁵

The defendant-appellee, the insular Treasurer, demurred (R. 8) on the ground that the payment had not been made under protest, but was voluntary. The District Court sustained (R. 9-10) the demurrer, and denied (R. 16-17) plaintiff's motion for rehearing. As stated, the insular Supreme Court dismissed plaintiff's appeal to it from the District Court, and on July 28, 1936, affirmed the District Court's judgment "because the tax was not paid under protest", in view of its own prior decisions, saying (R. 18):

⁵ The transcript of the record fails to show the date this suit was begun in the District Court. The "Amended Complaint" (R. 1-7) is dated July 11, 1933 (R. 7-8), nearly a year after the Board's second decision of August 22, 1932. But in the meantime there had apparently been an original complaint, the proceedings upon which do not appear in the transcript of the record here; which begins (R. 1) with the "Amended Complaint".

"* * * this court held on the 24th instant in *Porto Rico Fertilizer Co. vs. Domenech, Treasurer*,⁶ following that of *Compañía Agrícola de Cayey, Ltd., vs. Domenech, Treasurer*, 47 P. R. R." (47 P. R. Dec. 535 (*Spanish edition*), September 29, 1934), "that without payment under protest resort may not be had to the courts of justice from the ruling of the Treasurer."

On the plaintiff company's motion for reconsideration, the insular Supreme Court adhered to its decision in the present case, saying, March 17, 1937, in denying the motion for reconsideration (R. 23-24):

"The appellant sought to recover the excess payment from the Treasurer. Under Section 75 of Act No. 74 of 1925 (Session Laws, p. 400)" [at pp. 536-538; Appendix, *infra*, p. 45], "which under our most recent opinion (*Puerto Rico Fertilizer Company vs. Domenech*) we have held the act to be applicable, the Treasurer is authorized 'to remit, to refund and pay back all taxes erroneously or illegally assessed or collected * * * .'"

"This is a discretionary matter in the treasurer and our direct decision in the *Puerto Rico Fertilizer [Company]* case is that the said section gives the taxpayer no additional right to file a suit for the recovery of taxes. It makes no difference what the method taken by the taxpayer in the *Puerto Rico Fertilizer Company* case was, for we feel bound to hold without special reference to the procedure in that case, that its reasoning and the reasoning of this case compels us to declare that the appellant is without remedy by suit.

⁶The *Fertilizer Company* case, *supra*, 49 P. R. Dec. 45 (*original opinion*), 50 *ib.* 405 (*rehearing*), and 51 *ib.* 67 (*second rehearing denied*), No. 3274 in the Circuit Court of Appeals, which was affirmed in the same opinions in which the present case was reversed by that court. Pertinent portion of the opinion on rehearing (50 P. R. Dec., at pp. 413-414, *supra*; *Spanish edition*; *English edition not yet published*) is in Appendix III, *infra*, pp. 50-54.

"Taxes voluntarily paid in the absence of a statute authorizing it can not ordinarily be recovered. *Little v. Bowers*, 134 U. S. 54" [should read p. 547]; "61 C. J. 985. It is true that under Act No. 80 of 1919 a direct suit was allowed against the Treasurer to recover taxes voluntarily paid. Since 1921, however, the right to bring suits for the recovery of taxes other than those paid under protest has been abrogated. *Compania Agrícola de Cayey, Ltd., v. Domenech*, 47 P. R. R. [47 P. R. Dec. 535, *supra*]. The mere fact that the Legislature gave a taxpayer the right to recover under certain circumstances does not confer that right under different circumstances, namely, when a person does not pay under protest.

"By legislative enactment a payment under protest is a condition precedent to recovery by suit.

"The motion for reconsideration should be denied."

In the *Porto Rico Fertilizer Company* case, to which the Supreme Court of Puerto Rico made reference in its opinion in this case, as above quoted (*Porto Rico Fertilizer Co. vs. Manuel V. Domenech, Treasurer of Puerto Rico*) that court said upon rehearing, July 23, 1936,⁷

"As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of justice without paying under protest. If said taxpayer feels aggrieved by the tax assessed, he may, within thirty days after being notified, appeal to the Board and obtain that said Board overrule the deficiency determined by the Treasurer, as provided in Section 57 of said law, and he may, if the decision of the Board is against him, pay under protest and, within thirty days after payment, resort to the courts of justice availing himself of the right grant-

⁷ 50 P. R. Dec. 405, 413 [Spanish edition; English edition, not yet published]; translation appearing on page 30 of the Record in that case in the Circuit Court of Appeals, No. 3274: Second rehearing denied February 26, 1937, 51 P. R. Dec. 67 (*Advance Sheets*); Record in C. C. A., No. 3274, *supra*, pp. 42-44 (*Confer* foot-note 6, *ante*, p. 13).

ed by Section 76 of the said law of 1925. He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice."

Opinions of the Circuit Court of Appeals

In the Circuit Court of Appeals, no two of the judges wholly agreed with each other. Each of the three judges filed his own separate opinion; but, as above stated, PRESIDING JUDGE BINGHAM and JUDGE WILSON concurred in the results, affirming the judgment of the insular Supreme Court in the *Fertilizer* case and reversing it in the present *Yabucoa Sugar Company* case. JUDGE MORTON agreed with the affirmance in the *Fertilizer Company* case, but dissented from the reversal in the present case, saying: "I think both judgments should be affirmed" (R. 43).

PRESIDING JUDGE BINGHAM's opinion (R. 29-34), after noting (R. 33) that

Section 75 authorizes the Treasurer "to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, or penalties collected without authority, and all taxes that appear to be unjustly assessed and excessive in amount, or in any manner wrongfully collected,"

concludes (R. 33) that:

" * * Section 76(b) was intended to authorize the maintenance of a suit against the Treasurer, in case he refused to pay back the illegal or excessive tax collected, as he was authorized and directed to do under Sections 75, 65,⁸ and 64. It certainly could not

⁸ Apparently, this should read "55", as should also his reference to "Section 65", in the sixth line of page 33 of the Record.

have been the intention of the law maker to leave the payment of the taxpayer's just claim *solely* to the whim of the Treasurer."

JUDGE BINGHAM, in effect, ignored⁹ the question *whether or not the Board of Review and Equalization has jurisdiction* of an appeal from the Treasurer's determination of the amount of the refund, if any, to be allowed a taxpayer on his petition for refund of *supposed over-payments* of income taxes paid voluntarily and without protest in accordance with the taxpayer's own tax return [*as contra-distinguished from an appeal from a deficiency tax assessed by the Treasurer*], and assumes without further argument or discussion that the amount found by the Board of Review and Equalization to be an over-payment is necessarily "justly due" the sugar company, saying (R. 32):

"*the sole question is whether it can maintain a suit against the Treasurer under 76(b) to recover *what is justly due it*, the tax having been paid without protest". (*Italics supplied*)

JUDGE BINGHAM also, in referring (R. 32-33) to the Treasurer's regulations, apparently infers that such regulations might be relied upon to sustain the jurisdiction of the court in this case.

⁹ Except for saying, in commenting on the Treasurer's regulations [*not pleaded, nor otherwise appearing in the record, and not mentioned in the opinions of the insular courts, either the District Court or the Supreme Court*]:

"Its only defect, as we view it, is in failing to give effect to the express language of Section 76(b) which calls not only for the presentation of a claim for refund to the Treasurer but also to the Board of Review and Equalization on appeal."

JUDGE WILSON (R. 34-40) concurs "in the result of the opinion of JUDGE BINGHAM", but "on the grounds set forth below", in his own opinion.

He holds (R. 37-38, 39) that in case a question is raised as to supposed voluntary overpayment, and the Treasurer refuses to grant a refund in accordance with the plaintiff's claim, then

"the taxpayer under Section 76(b) may appeal to the Board of Review and Equalization" (R. 37-38),
 * * * the decision of which is final, which was done in this case" (R. 39);¹⁰

and that (R. 39):

"Section 76(b) *clearly implies* that a suit may be brought to recover any sum found to be due by the Board of Review as an overpayment."¹¹ (*Italics supplied*)

He says further (R. 37):

"that, while ordinarily this Court will follow the interpretation of the law of Puerto Rico by the Insular Supreme Court, we think we are warranted in determining, without regard to the many conflicting decisions of the Insular Supreme Court, what seems to us to be the intent of the Insular Legislature in

¹⁰ Although the only sections of the Act authorizing appeals to the Board of Review and Equalization appear to be sections 57 and 62(b), [and, for a reconsideration, section 76(a)], which relate solely to appeals from the determination of the Treasurer in relation to **deficiency** taxes. There appears to be no provision in the statute providing [expressly, at least] for appeals to the Board in relation to claims for refunds of voluntary payments.

The language of section 76(b) does not appear, on its face, to grant any independent right of appeal to the Board, other than that already provided "*according to the provisions of law in that regard*". [*Appendix, infra*, p. 48].

¹¹Holding as he does, that the taxpayer has a right of appeal to the Board in such a case of a claim of volun-

the passage of Act 74 of the Laws of 1925 so far as it affects the decision of these cases"¹²

PETITIONER'S CONTENTION

Petitioner, as above indicated, believes that the unanimous decision of the Supreme Court of Puerto Rico, following its own earlier unanimous decisions in earlier cases interpreting this local Territorial statute, in rela-

tary overpayments of taxes, and that the decision of the Board is "final", JUDGE WILSON, of course, pays no attention to the fact that the plaintiff's "Amended Complaint" does not contain any allegations upon which an examination can be based as to the correctness, in fact, of the respective differing conclusions of the Board, the Treasurer, and the taxpayer itself in its original return, as to the allowances to be made on its item of "Repairs" for its preceding fiscal year of 1926.

¹² But he has apparently failed to notice that there are no "conflicting decisions" of the insular Supreme Court upon the questions here involved of the supposed right of a taxpayer to appeal to the Board of Review and Equalization from the determination of the Treasurer under sections 54, 55, 64, and 75 of a claim for supposed voluntary overpayment, and of the supposed right of the taxpayer to maintain an action in court, such as this, practically in the nature of an appeal to the courts from the Treasurer's determination of such a claim for refund of voluntary supposed overpayments. On those questions *there is no conflict in the decisions of the Supreme Court of Puerto Rico*. That court has uniformly (and unanimously) held, in three decisions, including that in the present case, that the Treasurer's determination of such a claim for a refund is final; that that is a matter entrusted by those sections of the statute to the Treasurer's determination in his sound executive discretion; and the insular Supreme Court has never recognized any right of appeal from the Treasurer, from such a determination on a claim for refund of such voluntary payments, either to the Board of Review and Equalization, or to the courts. See, *infra*, Supporting Brief, pp. 32-34.

tion to the questions here presented, was clearly right, and that JUDGE MORTON was right in agreeing with it.

That the Legislature, in conferring upon the Treasurer the power to "determine the correct amount of the tax" (Sections 54 and 55 of the Act), and authorizing him to credit or refund over-payments (Sections 55, 64, and 75), plainly intended to make his "determination" of "the correct amount of the tax" final.¹³ This the Legislature had the power to do (*Dismuke vs. United States*, 297 U. S. 167, 171-172); since the Legislature of Puerto Rico possesses substantially all of the powers of a State Legislature in that regard (*People of Puerto Rico vs. Shell Co.*, 302 U. S. 253, 260-261); and Puerto Rico is so far sovereign that it may not be sued without its own consent (*People of Puerto Rico vs. Rosaly*, 227 U. S. 270); and, at common law, taxes voluntarily paid cannot ordinarily be recovered at all in the absence of a statute authorizing it (*Little vs. Bowers*, 134 U. S. 547; *Moore Ice Cream Co. vs. Rose*, 289 U. S. 373, 375-376).

That the majority of the Circuit Court of Appeals, JUDGES BINGHAM AND WILSON, erred in reading into the negative prohibitory language of Section 76(b) of the Act, affirmative grants of power (a) to the Board of Review and Equalization to entertain appeals and to bind the Treasurer in other cases than those relating to deficiency taxes, and (b) to the courts to entertain actions in the nature of appeals from the Treasurer's "determination" "of the correct amount of the tax" in other cases than those relating to deficiency taxes.

That the majority Judges also erred in disregarding the settled rule as to the respect to be paid to the deci-

¹³ Except as to "deficiency taxes", with relation to which express provisions are made, expressly providing for appeals to the Board of Review and Equalization, and for recourse to the courts. Sections 57, 62(b), and 76(a) and (b).

sions of the local Territorial Supreme Court interpreting a local Territorial statute; and erred in overlooking and disregarding the absence of any allegations in the "Amended Complaint" tending to impeach the Treasurer's decision on the merits in any way, or tending to show that as to the allowances to be made on the item of the plaintiff sugar company's "Repairs" for its fiscal year 1936,—upon which the calculations of the Board of Review, and of the Treasurer, and of the company itself in its initial tax return, differed among themselves,—there was any reason for giving any more weight to the Board's opinion than to that of the Treasurer, — (*unless* the Treasurer is to be considered as bound by the decision of the Board upon an appeal other than in relation to deficiency taxes).

And that in each of the separate opinions of the two majority Judges, there is further error in that both of their opinions overlook and are in conflict with the applicable decisions of this court, particularly *Dismuke vs. United States*, *supra*, 297 U. S. 167, 171-172; *Little vs. Bowers*, 134 U. S. 547; *Moore Ice Cream Co., vs. Rose*, 289 U. S. 373, 375-376; and, in connection therewith, the decisions of this court in *People of Puerto Rico vs. Shell Co.*, 302 U. S. 253, 260-261, and *People of Puerto Rico vs. Rosaly*, 227 U. S. 270.

REASONS FOR GRANTING THE WRIT

This case presents an important question of law of wide general interest, especially to the Government and to the people of Puerto Rico. There is a direct conflict of opinion between the unanimous opinions of the Supreme Court of Puerto Rico in this case, following its decision in earlier cases, and of JUDGE MORTON of the Circuit Court of Appeals, in agreement with the Supreme Court of Puerto Rico, on the one hand, and the separate although concurring opinions of the other two judges of the Circuit Court of Appeals, PRESIDING JUDGE BINGHAM and JUDGE WILSON, on the other hand.

It is believed that the opinions of the majority judges of the Circuit Court of Appeals have overlooked and are in conflict with applicable decisions of this court, as hereinbefore stated.

The primary question here presented never has been, and it is believed should be, settled by this court.

The budget of the insular government is not large and must be closely guarded. Puerto Rico is jealous of its high financial credit. It is peculiarly exposed to emergencies from hurricanes. Its revenues are largely income taxes from a few great corporations. If the majority judges here are correct, then, as JUDGE MORTON points out (R. 42, *supra*):

“every tax which has been voluntarily paid without protest may be re-opened on claims for refund at any time within four years and resettled *de novo* in court proceedings.”

Wherefore, it is respectfully requested that this petition for a writ of certiorari be granted.

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
*Solicitor for the Department of the Interior,
Of Counsel.*

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinions of the insular District Court ("Order, R. 9-10), and "Judgment" overruling plaintiff's motion for reconsideration (R. 16-17), are not officially reported. The opinions of the insular Supreme Court on the first hearing (R. 18) and upon reconsideration (R. 23-24) are officially reported, respectively, in 50 P. R. Dec. 962 (*Spanish edition*), and 51 P. R. Dec. 135 (*Spanish edition; Advance Sheets*). They have not yet appeared in the English edition of the Puerto Rico Reports. The three separate opinions of the judges of the Circuit Court of Appeals are reported in 98 F. (2d) 398-404 (*Advance Sheets*).

JURISDICTION

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered July 13, 1938 (R. 29). The time within which to apply for a writ of certiorari to this court was extended fifty days by order of MR. JUSTICE BRANDEIS, until December 2, 1938 (R. 44).

QUESTIONS PRESENTED

The questions here presented are stated in the Petition (*ante*, pp. 2-3).

STATUTES INVOLVED

These are indicated in the Petition (*ante*, pp. 3-7), and in Appendices I and II (*infra*, pp. 37-49), and their bearing on this case is indicated in the Petition (*ante*, pp. 7-9).

STATEMENT

A statement of the case is in the Petition (*ante*, pp. 9-15).

SPECIFICATIONS OF ERRORS TO BE URGED

These are indicated under the headings "Questions Presented" and "Petitioner's Contention" in the Petition (*ante*, pp. 2-3 and 18-20).

SUMMARY OF ARGUMENT

This appears under the heading "Petitioner's Contention" in the Petition (*ante*, pp. 18-20).

ARGUMENT

Point I

The Legislature of Puerto Rico was under no obligation to provide taxpayers any recourse to the courts from the insular Treasurer's "determination" of the "correct amount of the tax", upon taxpayers' petitions for refunds of supposed overpayments made voluntarily and without protest.

The Legislature may properly make the Treasurer's determination final in such cases.

A. This is the rule with relation to the federal government. This court said in *Dismuke vs. United States*, *supra*, 297 U. S. 167, 171-172;

"The United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise. See *United States vs. Babcock*, 250 U. S. 328. * * * If the statutory benefit is to be allowed only in his" [the administrative officer's] "discretion, the court will not substitute their discretion for his."

B. The same rule is applicable with relation to the government of Puerto Rico, which is so far sovereign that it may not be sued, except with its own consent. *People of Puerto Rico vs. Rosaly*, 227 U. S. 270. The Legislature of Puerto Rico possesses substantially the

same powers in this respect as the legislature of a State. *People of Puerto Rico vs. Shell Co.*, 302 U. S. 253, 260-261, and,

“The grant of legislative power in respect of local matters contained in section 32 of the Foraker Act¹⁴ and continued in force by section 37 of the Organic Act of 1917¹⁵ is as broad and comprehensive as language could make it.” (*People of Puerto Rico vs. Shell Co.*, *supra*, at p. 261).

C. At common law, in the absence of statutory permission, there is no recourse to the courts for the recovery of taxes paid voluntarily and without protest. *Moore Ice Cream Co. vs. Rose*, 289 U. S. 374, 375-376; *United States vs. N. Y. & Cuba Mail S.S. Co.*, 200 U. S. 488; *Chesebrough vs. United States*, 192 U. S. 253; *Little vs. Bowers*, 134 U. S. 547; *Curtis' Adm'x. vs. Fiedler*, 2 Black 461; *Elliott vs. Swartwout*, 10 Pet. 137, 153.

Point II

The negative prohibitory language of section 76(b) of the Puerto Rican Income Tax Act of 1925 does not evidence any intent on the part of the Legislature thereby to make any affirmative grants of power either (a) to the Board of Review and Equalization to entertain any appeals or to bind the Treasurer by its decisions in any cases other than those relating to deficiency taxes assessed by the Treasurer, or (b) to grant to the taxpayers any recourse to the courts, or to the courts any jurisdiction to entertain taxpayers' suits, to review the Treasurer's determinations of the correct amount of the tax, in any cases other than those relating to "deficiency taxes".

A. The wording of section 76(b) of the Act of 1925 is exclusively negative and prohibitory, on its face.

¹⁴ Act of Congress of April 12, 1900, c. 191, 31 Stat. 77.

¹⁵ Act of Congress of March 2, 1917, c. 145. 39 Stat. 951, 964.

B. It is a sub-paragraph (the second paragraph) of section 76; and the heading for the entire section, as enacted by the Legislature as a part of the law, is "LIMITATIONS upon Suits and Proceedings by the Taxpayer". There is here no indication of any intention on the Legislature's part to include in this section any affirmative grant of additional rights or powers either to the taxpayer, to the Board of Review, or to the courts.

C. A "negative pregnant" cannot ordinarily amount to an affirmative grant of powers. The effect of the negative pregnant is simply,—(as, ordinarily, the question arises, in pleadings in actions at law),—to admit the existence or application of the ordinary general rule, except in so far as it is specifically denied by the language of the negative pregnant. It goes no further. It does not affirmatively create a new rule of the contrary tenor.

D. As applied to the present case, if there had been in effect a general rule, either pre-existing or created by some other general legislation, or created by other provisions of this Act allowing recourse to the courts or allowing appeals to the Board of Review and Equalization from tax determinations of the Treasurer generally, —or in cases other than those relating to deficiency taxes,—then the effect of the negative pregnant language in section 76(b) would have been to confine its limitations to the specific cases there mentioned and to leave the pre-existing (or otherwise existing) right of recourse to the courts, or of appeal to the Board, unaffected and still in existence. *But that is not the situation here.* Independently of this section 76(b) there is, clearly, no recourse to the courts and no appeal to the Board from the Treasurer's determinations of the correct amount of the tax, except in relation to deficiency taxes. There is, therefore, no general right of such recourse or appeal that could be left unaffected by the negative pregnant language of this statute. To the contrary, the general

rule that is left so unaffected is the general rule that there is no such recourse to the courts and no appeal to the Board (except with relation to deficiency taxes), because none existed at common law, and none is otherwise granted by the statute.

Hence JUDGE MORTON was right in saying of this Section 76(b) in his dissenting opinion in this case (R. 41):

“At first reading it appears to be a limitation or restriction on suits for recovery of overpayments, already authorized elsewhere in the statute. It says in effect that no suit shall be maintained in any court until a claim for refund shall have been filed with the Treasurer and on appeal with the Board of Review ‘*according to the provisions of law in that regard and the regulations established in pursuance thereof.*’ The difficulty is that there are no provisions of law authorizing suits in court for the recovery of taxes voluntarily paid or empowering the Board of Review to deal with claims for refund on appeal from the Treasurer, or with taxes which *have been paid.*” (*Italics are JUDGE MORTON’S.*)

E. It appears that, elsewhere in this Act, *the Legislature of Puerto Rico, when it desired to confer affirmative powers or rights upon the Board of Review and Equalization, or upon the courts, or the taxpayer, regularly employed direct positive affirmative language to that end, and did not leave its intent to be gathered from doubtful implication from negative pregnant phraseology.* Thus, in sections 57(a) and 62(b) [Appendix, *infra*, pp. 42, 43], relating to deficiency taxes, the right of appeal to the Board of Review and Equalization is specifically given to the taxpayer by direct affirmative language; and, likewise, with relation to deficiency taxes, the right of appeal to the courts is specifically given to the taxpayer in direct affirmative unmistakable language by Sections 57(L), 62(b) and 76(a); Appendix, *infra*, pp. 42, 43, 47-48. [It is agreed on all hands that **Section 76(a) relates only to deficiency taxes:** JUDGE BINGHAM, R. 31; JUDGE WILSON, R. 37; JUDGE MORTON, R. 41].

Point III

It is particularly significant of the intent of the Legislature of Puerto Rico not to permit any recourse to the courts from the Treasurer's determination of the correct amount of the tax (or any appeal to the Board of Review and Equalization), except in relation to deficiency taxes, that, in drafting sections 75 and 76(b) of the Act of 1925, it entirely omitted provisions appearing in cognate sections of the earlier Puerto Rican Act of 1919, and of the federal Revenue Act of 1924, respectively, upon which these Sections 75 and 76(b) are otherwise closely modeled, and which would have permitted recourse to the courts from all tax determinations of the Treasurer, had the Legislature seen fit to follow them in drafting this Act of 1925.

A. Section 75 of the Act of 1925 (Appendix, *infra*, p. 47) is quite closely modeled upon section 66 of the earlier Act of 1919 (Act No. 80, Laws of Puerto Rico, 1919, pp. 612, 666; Appendix, *infra*, pp. 48-49), which had been repealed by the Act of 1921, repealing the entire 1919 Act. (Act No. 43, Laws of 1921, pp. 312, 356; Appendix, *infra*, p. 49).

(1) *But the second paragraph of that Section 66 of the 1919 Act had gone on to provide,—in addition to its first paragraph which is substantially followed in Section 75 of the 1925 Act,—the following, in its second paragraph, expressly granting recourse to the courts from all tax determinations of the Treasurer under that 1919 Act:*

“That when proper claim has been made to the Treasurer of Puerto Rico for the return, reimbursement or remittal of any duties or taxes erroneously levied or collected, * * * if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice”;

and, under that provision in the second paragraph of that section of the 1919 Act, the Supreme Court of Puerto Rico had held that, *because of that express legislative direction*, a taxpayer, even though he had paid voluntar-

ily and without protest, might make his claim for refund to the Treasurer and if the Treasurer denied it "without reason" he might have his action in court against the Treasurer for the refund. *Serrallés vs. Treasurer*, 30 P. R. Rep. 220, 223-224; *McCormick vs. Treasurer*, 44 P. R. Dec. (*Spanish ed.*) 432, 438-440.

(2) But, as the Supreme Court of Puerto Rico pointed out in its opinion in *Compania Agricola de Cayey vs. Domenech, Treasurer*, *supra*, 47 P. R. Dec. 535, 539, quoted and followed in its opinion of July 23, 1936, in the present case (R. 30-31), the entire Income Tax Act of 1919 was repealed by the repealing clause, section 63, of the Income Tax Law of 1921 (Act No. 43, Laws of 1921, pp. 312, 356; Appendix, *infra*, p. 49), which repealed the entire 1919 Income Tax Law, substituting the 1921 Act as a complete new code in lieu thereof, and saving only the provisions of the earlier act "in force as regards the levying and collection of all taxes accrued thereunder, and for the levying and collection of all fines imposed or that may be imposed in connection with said taxes."

(3) *The 1921 Act contained no provision whatever corresponding to section 66 of the 1919 Act, and no provision of any kind for the refunds of income tax payments made voluntarily and without protest.* The result was that, as the Supreme Court of Puerto Rico said in the *Compania Agricola de Cayey* case quoted in the July 23, 1936, opinion in the present case (R. 30):

"It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by means of lawsuit also disappeared. From 1921 on the payment under protest was an express condition preliminary to the initiation of a lawsuit. Though the law of 1921, by its terms, did not abrogate the right to sue, it did estab-

lish the procedure whereby the refund of the taxes could be obtained. And such was the general understanding."

(4) Then, four years later, the Income Tax Law of 1921 was repealed, in its turn, and this Act of 1925 was substituted for it. And this Act, by its Section 75 here involved, again provided,—but in different form,—a discretionary power in the Treasurer to refund to a taxpayer income tax payments mistakenly or unwittingly made voluntarily and without protest. But, as was pointed out by the insular Supreme Court in the *Compania Agricola de Cayey* case, and in its opinion of July 23, 1936, in the *Fertilizer case* (Appendix III, *infra*, pp. 50-54), following and quoting the *Agricola de Cayey* case, and followed in the present case (R. 18, 23-24), the Legislature in restoring to the taxpayer, by Section 75 of the present code, the privilege of requesting the Treasurer to refund voluntary tax payments unwittingly made, *did not see fit to restore* the right formerly given to the taxpayer by the last paragraph of section 66 of the 1919 Act, as above quoted (*ante*, p. 27; Appendix *infra*, pp. 48-49), to resort to the courts in case the Treasurer denied his claim "without reason". *That provision of the 1919 Act was not reenacted*. To the contrary, the Legislature in the present code enacted simply (Laws of 1925, at pp. 356-538; Appendix *infra*, p. 47).

"Section 75. The Treasurer is *authorized* to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; *and shall make report to the Legislature of Puerto Rico at the beginning of each regular session of all transactions under this section*" (*Italics supplied*);

and stopped there.

(5) *And then, as if to emphasize its intention not to permit action in the courts to review what the Treasurer has "determined to be "the correct amount of the tax"*

(Sections 54, 55), or any refusal of the Treasurer to change his "determination", or his refusal to allow any further refund in favor of a taxpayer upon any request under section 75,—and to drive home the legislative purpose that there should be no resort whatever to the courts for any refund of income taxes or excess-profits taxes, except in accordance with the provisions of the mandatory system established by sections 54, 55, 64 and 75 of the Act,—the Legislature, by section 76(b) of the Act (Laws of 1925, at pp. 538-540; Appendix *infra*, p. 48) expressly provided:

"(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or any pecuniary penalty . . . until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard¹⁶, and the regulations established in pursuance thereof".
(Italics supplied)

In other words, that there should be no suit at law or other proceeding in court for the recovery of voluntary payments, nor by way of appeal from the Treasurer's action in denying any request made to him under Section 75 of the Act.

(6) And the legislative intention is further driven home and emphasized by the significant fact that the Legislature, in framing section 76(b) of this statute, followed, almost word for word, the phraseology of Section 3226 of the United States Revised Statutes as amended by Section 1014(a) of the federal "Revenue Act of 1924", the Act of Congress of June 2, 1924, c. 234, 43 Stat. 253, 343, until the Legislature came down to the words "according to the provisions of law in that regard", in the federal Act (7th and 8th lines of sec. 3226, U. S. Rev.

¹⁶ *Id est*, otherwise provided.

(except deficiency taxes)

Stats., as amended by sec. 1014(a) of the Federal Revenue Act of 1924; *9th and 10th lines*, as copied in Appendix II, *infra*, p. 49; *first line at the top of the page* in the Puerto Rican Act, in the Laws of Puerto Rico, 1925, p. 540); **but then stopped there**. Instead of copying the immediately following provision of the federal statute allowing suits in court for refund of voluntary payments even though made without protest, the Legislature of Puerto Rico *deliberately omitted that provision of the federal statute, and did not copy it nor put in any corresponding language at all*. The federal statute (Rev. Stats., Sec. 3226, as amended by section 1014(a) of the Federal Revenue Act of 1924; 43 Stat. 343; Appendix II, *infra*, p. 49),—immediately following the word “regard”,—goes on, “and the regulations of the Secretary of the Treasury established in pursuance thereof”; and then comes, in the federal statute, the clause which we have printed in **bold type** in Appendix II, hereto, *infra*, p. 49:

“but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest. * * *

The omission of that language by the Legislature of Puerto Rico in drafting Section 76(b) of the Puerto Rican Act here in question was certainly not an oversight. It was plainly deliberate; plainly intended to drive home the intention of the Legislature of Puerto Rico not to follow the Congress in regard to the recovery of voluntary income tax payments not made under protest; and to drive home and emphasize the Legislature's intention, in restoring, by Section 75 of the present Act, a privilege analogous to that formerly given Puerto Rican taxpayers by Section 66 of the old 1919 Act, not to revive the right of access to the courts formerly given by the second paragraph of Section 66 of the 1919 Act in case of the Treasurer's denial of a taxpayer's request “without reason”. That second paragraph of Section 66 of the 1919 Act was entirely omitted in

framing Section 75 of the present code,—an omission which, again, was clearly deliberate, and was not an oversight.

(7) It results that, in view (1) of this deliberate action of the Legislature of Puerto Rico in omitting these clauses, both from Section 75 and from Section 76(b), in framing the present income tax code, and in view (2) of the established rule recently reiterated by this court in the *Moore Ice Cream Company* case that (*Moore Ice Cream Co. vs. Rose, supra*, 289 U. S. 373, 375-376):

“1. At common law * * * protest at the time of payment was a condition precedent to the recovery of a tax. * * * The rule still persisted until 1924, when it was abolished by the Revenue Act of that year, with a *proviso* that pending suits should be unaffected by the change”,

the common law rule is the rule still applicable in Puerto Rico, where no statutory change has been made by the Legislature, such as the Congress made in the federal statute by Section 1014 of the Federal Revenue Law of 1924. The rule is correctly applied by the insular Supreme Court in its decision in the present case, and in its earlier decisions which it followed here.

Point IV

The opinions of the majority members of the Circuit Court of Appeals, Judges Bingham and Wilson, erred in failing to apply here the established rule that the decision of a Territorial Supreme Court, such as the Supreme Court of Puerto Rico, construing a local statute of the Territory, will be followed unless “clearly erroneous”; and further erred in failing to recognize that the decision of the Supreme Court of Puerto Rico in this case was, in any event, not *clearly erroneous*, and, therefore, should have been followed, under this rule.

The decision of the insular Court in this case following the rule already established by it in the preceding cases of *Compania Agricola de Cayey Ltd., vs. Domenech, Treasurer, supra*,

47 P. R. Dec. 535, and *Puerto Rico Fertilizer Co. vs. Domenech, Treasurer*, 50 P. R. Dec. 405, decided July 23, 1936 (Appendix III, *infra*, pp. 50-54), falls within the established rule that the decision of a Territorial Supreme Court, such as the Supreme Court of Puerto Rico, construing a local statute of the Territory, will be followed, unless "clearly erroneous". This decision of the insular Court is certainly not "clearly erroneous"; but on the contrary is right and reasonable; and therefore under the established rule will not be disturbed. *Domenech vs. Verges*, 69 F. (2d) 714; *De Villaneuva vs. Villaneuva*, 239 U. S. 293, 289-299; *Cardona vs. Quinones*, 240 U. S. 83, 88; *Loiza Sugar Co. vs. People of Puerto Rico*, 57 F. (2d) 705, 706; *Porto Rico Coal Co. vs. Domenech*, 41 F. (2d) 183, 185; *Richardson vs. Fajardo Sugar Co.*, 237 Fed. 195, 196; *Russell & Co. vs. Sancho Bonet, Treasurer*, 92 F. (2d) 821.

C. On this point JUDGE MORTON was clearly correct in saying in his dissenting opinion in this case (R. 42), in relation to the holding of the Supreme Court of Puerto Rico:

"The Supreme Court accordingly held that with respect to voluntary overpayments the taxpayer was in the hands of the Treasurer on matters of refund, 'if the decision of the Treasurer is against him he cannot appeal from the same to courts of justice.' This does not seem to me an unreasonable solution of the difficulty which confronted them. Indeed I incline to think it was right. Under the view, taken in the majority opinions, every tax which has been voluntarily paid without protest may be reopened on claims for refund at any time within four years and resettled *de novo* in court proceedings. This is in fact what is approved by the decision in the *Yabucoa Sugar* case before us. Greater consideration is shown to voluntary overpayments than to deficiency assessments. This certainly is a wide departure from the view of the Supreme Court of Puerto Rico. It has often been said that in matters of local law the opinion of that court is not to be set aside unless

clearly wrong. As I have said I incline to think the Supreme Court of Puerto Rico was right; I certainly do not think it was clearly wrong."¹⁷

Point V

The opinions of the majority Judges of the Circuit Court of Appeals erred in overlooking or ignoring the *second question presented on the record in this case*. ("Questions Presented", *ante*, Petition, pp. 2-3).

If, as petitioner believes to be clear, no right of appeal is given by the statute to the Board of Review and Equalization from the Treasurer's determination of the correct amount of the tax in any cases other than those relating to deficiency taxes, then it follows that the Board of Review had no jurisdiction to entertain the second appeal to that Board taken by the plaintiff sugar company here from the Treasurer's determination of the tax on March 28, 1930, allowing a refund of \$525.56, but not allowing more (R. 6; *ante*, Petition, p. 11); and therefore that the Treasurer was not bound in any way by the decision of the Board on that second appeal (or by the decision on the first appeal in so far as it purported to do more than to disallow the deficiency tax); and, hence, that the plaintiff's "Amended Complaint" is fatally defective, and states no cause of action, and that the demurrer to it was properly sustained, because *it contains no allegation upon which any conclusion can*

¹⁷ JUDGE WILSON (R. 37) declines to follow the insular Court's interpretation of this local statute because of "conflicting decisions" of that court. *But there are no such conflicting decisions, as to the questions here involved.*

There was a conflict of decision on another point, viz., whether Act No. 8 of 1927 changed in any way the provisions of the Act of 1925 here involved. But, as JUDGE WILSON himself notes (R. 40) that question has now been "finally concluded" in the negative. It is not here. (There

be based concerning the correctness, in fact, of the Treasurer's determination, or of that of the Board, or of the original calculation of the sugar company itself upon which it made its own voluntary tax payment upon its own original tax return, as to the item of "Repairs" for its fiscal year 1926, involved in the calculation, by the respective different parties, of the "correct amount of the tax", as alleged in the "Amended Complaint" (R. 2-8). *The Amended Complaint relies solely upon the assumption that the Treasurer was bound by the Board's decision, and "disobeyed it" (Par. XIII, R. 6).*

As to this point, therefore, JUDGE MORTON was correct in saying in his dissenting opinion (R. 42-43):

"In the Sugar Company case the claim for refund rested on changes in income or deductions made by the taxpayer after the tax had been voluntarily paid. They were not approved by the Treasurer. It does not appear that the Sugar Company's claim was established beyond fair doubt nor that it was clearly the duty of the Treasurer to accept it."

CONCLUSION

The unanimous decision of the Supreme Court of Puerto Rico, in accord with its decisions in the earlier *Fertilizer* case and in that of *Compania Agricola de Cayey, Ltd., vs. Domenech, Treasurer*, with which JUDGE MORTON agreed in substance in his dissenting opinion in the Circuit Court of Appeals, was right, and should be affirmed; and the judgment of the Circuit Court of Appeals, entered upon the majority opinions of PRESIDING JUDGE BINGHAM and JUDGE WILSON, vacating that of

was also another question, not here involved, as to whether, with relation to deficiency taxes, a second appeal to the board was necessary after the treasurer's final decision.)

the Supreme Court of Puerto Rico, was wrong and should be reversed.

And, in view of its importance and its seriousness, the question here presented should be settled by this court.

It is therefore, earnestly requested that the writ of certiorari be granted.

Respectfully submitted,

WILLIAM CATTEON RIGBY,
Attorney for Petitioner.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
*Solicitor for the Department of the Interior,
Of Counsel.*

APPENDICES

APPENDICES

2

APPENDIX I

Pertinent Sections of Puerto Rican "Income Tax Act of 1924"; Act of August 6, 1925; Laws of 1925, pp. 400, 512, 526, 536-540.

PAYMENT OF INDIVIDUAL'S TAX AT SOURCE

Section 22.—(a) All persons, in whatever capacity acting, including lessees or mortgagors or real or personal property, fiduciaries, employers, and all officers and employees of The People of Porto Rico having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, commissions, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, of any non-resident individual not a citizen of Porto Rico, or of any partnership not engaged in trade or business within Porto Rico and not having any office or place of business therein and composed in whole or in part of nonresident individuals not citizens of Porto Rico (other than income received as dividends of the class allowed as a credit by subdivision (a) of section 18) shall (except as otherwise provided in regulations prescribed by the Treasurer under section 19) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 6 per centum thereof; *Provided*, That the Treasurer may authorize such tax to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent.

(b) Every person required to deduct and withhold any tax under this section shall make return thereof on or before March 15 of each year and shall on or before June 15 pay the tax to the official of The People of Porto Rico authorized to receive it. Every such person is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this section.

(c) Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(d) If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be recollected from the withholding agent; or in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

Section 23.—(b) If accrued taxes when paid differ from the amounts claimed as credits by the taxpayer, or if any tax paid is refunded in whole or in part, the taxpayer shall notify the Treasurer, who shall redetermine the amount of the tax due under Parts I and II of this title for the year or years affected, and the amount of tax due upon such redetermination, if any, shall be paid by the taxpayer upon notice and demand by the Treasurer, or the amount of tax over-paid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 64. In the case of such a tax accrued but not paid, the Treasurer as a condition precedent to the allowance of this credit may require the taxpayer to give a bond with sureties satisfactory to and to be approved by the Treasurer in such sum as the Treasurer may require, conditioned upon the payment by the tax payer of any amount of tax found due upon any redetermination; and the bond herein prescribed shall contain such further conditions as the Treasurer may require.

TIME AND PLACE FOR FILING INDIVIDUAL AND FIDUCIARY RETURNS

Section 27.—(a) Return (except in the case of non-resident individuals not citizens of Porto Rico) shall be

made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March. In the case of a nonresident individual not a citizen of Porto Rico returns shall be made on or before the fifteenth day of the sixth month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of June. The Treasurer may grant a reasonable extension of time for filing returns if application therefor is made before the date prescribed by law for filing the returns, whenever in his judgment good cause exists, and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than ninety days.

CORPORATION OR PARTNERSHIP RETURNS

Section 37.—(a) Every corporation or partnership subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer, or by a managing partner or any other person empowered to do so. If any foreign corporation has no office or place of business in Porto Rico, but has an agent in Porto Rico, the return shall be made and sworn to by the agent. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations or partnerships, such receivers, trustees, or assignees shall make returns for such corporations or partnerships in the same manner and form as corporations or partnerships are required to make returns. Any tax due on the basis of such returns made by receivers, trustees in bankruptcy or assignees shall be collected in the same manner as if collected from the

corporations or partnerships of whose business or property they have custody and control.

**TIME AND PLACE FOR FILING CORPORATE OR
PARTNERSHIP RETURNS**

Section 39.—(a) Returns of corporations or partnerships shall be made at the same time as is provided in subdivision (a) of section 27, except that in the case of foreign corporations not having any office or place of business in Porto Rico returns shall be made at the same time as provided in section 27 in the case of a nonresident individual not a citizen of Porto Rico.

(b). Returns shall be made to the Treasurer.

**PAYMENT, COLLECTION, AND REFUND OF TAX
AND PENALTIES**

Date on Which Tax Shall be Paid

Section 53.—(a) Except as provided in subdivisions (a) and (c) and (d) of this section the total amount of tax imposed by this title shall be paid—

(1) In the case of a taxpayer, other than a nonresident individual not a citizen of Porto Rico, and other than a foreign corporation not having an office or place of business in Porto Rico, on or before the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on or before the fifteenth day of the third month following the close of the fiscal year; and

(2) In the case of a nonresident individual not a citizen of Porto Rico, and of a foreign corporation not having an office or place of business in Porto Rico, on or before the fifteenth day of June following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on or before the fifteenth day of the sixth month following the close of the fiscal year.

(b) (1) The taxpayer may elect to pay the tax in two equal installments, in which case the first installment shall be paid on or before the latest date prescribed in subdivision (a) for the payment of the tax by the taxpayer, and the second installment shall be paid on or before the fifteenth day of the sixth month after such date.

(2) If any installment is not paid on the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from Treasurer.

EXAMINATION OF RETURN AND DETERMINATION OF TAX

Section 54.—As soon as practicable after the return is filed the Treasurer shall examine it and shall determine the correct amount of the tax.

OVERPAYMENTS

Section 55.—If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 64.

DEFICIENCY IN TAX

Section 56.—As used in this title the term “deficiency” means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax;
or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

Section 57.—(a) If, in the case of any taxpayer, the Treasurer, determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 30 days after such notice is mailed the taxpayer may file an appeal with the Board of Review and Equalization, alleging in writing and under oath the legal facts and grounds on which such appeal is based.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the Treasurer. No part of the amount determined as a deficiency by the Treasurer but disallowed as such by the Board shall be assessed, but a proceeding in a district court of competent jurisdiction may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 60 has expired.

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX

Section 60.—(a) Except as provided in section 61 and in subdivision (b) of section 57 and in subdivision (b) of section 62—

(1) The amount of income and excess-profits and the amount of income taxes imposed by this Act or by Income Tax Act No. 59, of 1917, Income Tax Act No. 80 of 1919, Income Tax Act No. 43 of 1921, or by any of said Acts, as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

CLAIMS IN ABATEMENT

Section 62.—(b) If a claim is filed as provided in subdivision (a) of this section the Treasurer shall by registered mail notify the taxpayer of his final decision on the claim. The taxpayer may within 30 days after such notice is mailed file an appeal with the Board of Review and Equalization. If the claim is denied in whole or in part by the Treasurer (or by the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the Treasurer, and the amount, the claim for which is allowed, shall be abated. A proceeding in court may be begun for any part of the amount claim for which is allowed by the Board. Such proceedings shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 60 has expired.

CREDITS AND REFUNDS

Section 64.—(a) Where there has been an overpayment of any income or excess-profits tax imposed by this

Act, or by Income Tax Act No. 59 of 1917, Income Tax Act No. 80 of 1919, and Income Tax Act No. 43 of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

When a payment has been made of any income or excess-profits tax under the Income Tax Act No. 43 of 1921, as amended, for the calendar year 1924, or for any fiscal year ending in 1925, the amount of such payment shall be credited to any income or excess-profits tax then owed by the taxpayer pursuant to the provisions of this Act or of the acts hereinbefore amended in this subdivision of any amendment thereof, and any balance of such excess shall be immediately reimbursed to the taxpayer.

(b) Except as provided in subdivision (c) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) If the invested capital of a taxpayer is decreased by the Treasurer, and such decrease is due to the fact that the taxpayers failed to take adequate deductions in previous years, with the result that there has been an overpayment of income or excess-profits taxes in any previous year or years, then the amount of such overpayment shall be credited or refunded, without the filing

of a claim therefor, notwithstanding the period of limitation provided for in subdivision (b) has expired.

(d) Where there has been an overpayment of tax under section 22 or 35 any refund or credit made under the provisions of this section shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

(c) This section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

CLOSING BY TREASURER OF TAXABLE YEAR

Section 65.—(a) If the Treasurer finds that a taxpayer designs quickly to depart from Porto Rico or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current rent unless such proceedings be brought without delay, the Treasurer shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this

section the finding of the Treasurer, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design.

(b) A taxpayer who is not in default in making any return or paying income or excess-profits tax under any Act of the Legislature of Porto Rico may furnish to The People of Porto Rico, under regulations to be prescribed by the Treasurer, security approved by the Treasurer, that he will duly make the return next thereafter required to be filed and pay the next thereafter required to be paid. The Treasurer may approve and accept in like manner security for return and payment of taxes made due and payable by virtue of the provisions of this section, provided the taxpayer has paid in full all other income or excess-profits taxes due from him.

(c) If security is approved and accepted pursuant to the provisions of this section and such further or other security with respect to the tax or taxes covered thereby is given as the Treasurer shall from time to time find necessary and require, payment of such taxes shall not be enforced by any proceedings under the provisions of this section prior to the expiration of the time otherwise allowed for paying such respective taxes.

(d) In the case of a citizen of Porto Rico about to depart from Porto Rico, the Treasurer may, at his discretion, waive any or all of the requirements placed on the taxpayer by this section.

(e) No individual not a citizen of Porto Rico shall depart from Porto Rico unless he first procures from the Treasurer a certificate that he has complied with all the obligations imposed upon him by the income and excess-profits tax laws.

(f) If a taxpayer violates or attempts to violate this section there shall, in addition to all other penalties, be

added as part of the tax 25 per centum of the total amount of the tax or deficiency in the tax, together with interest at the rate of 1 per centum a month from the time the tax became due.

RULES AND REGULATIONS

Section 68.—The Treasurer is authorized to prescribe all needful rules and regulations for the enforcement of this Act.

REFUNDS

Section 75.—The Treasurer is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to The Legislature of Porto Rico at the beginning of each regular session of all transactions under this section.

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYERS

Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Porto Rico.

Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence, and the hearing shall be set promptly for final decision.

If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case sufficient legal grounds and facts for applying again to the Board

for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of Porto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.

(c) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

Section 66, Act No. 80, approved June 26, 1919, "Income Tax Law of 1919"; Laws of Puerto Rico, 1919, pp. 612-672:

REFUND OR ABATEMENT OF TAXES

Section 66.—That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.

That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without

legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act.

Section 63, Act No. 43, approved July 1, 1921, "Income Tax Law of 1921"; Laws of Puerto Rico, 1921, pp. 312-356:

Section 63.—That all laws or parts of laws in conflict herewith are hereby repealed; but the provisions thereof shall continue in force as regards the levying and collection of all taxes accrued thereunder, and for the levying and collection of all fines imposed or that may be imposed in connection with said taxes.

APPENDIX II

Section 1014 of Federal "Revenue Act of 1924", Act of June 2, 1924, c. 234, 43 Stat. 253, 343.


LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER

Sec. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. * * * * *

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act."

MICROCARD

TRADE MARK 

22



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

3

8

9

9



377

APPENDIX III

PORTO RICO FERTILIZER COMPANY vs. MANUEL U. DOMENECH,
TREASURER

Pertinent portion of opinion of Supreme Court of Puerto Rico on Rehearing, July 23, 1936 [CHIEF JUSTICE DEL TORO], 50 P. R. Dec. 405, 410-414; translation that appearing in the printed transcript of the record (pp. 27-32) in that case on its appeal to the Circuit Court of Appeal, First Circuit.

Section 75 of said law authorizes the Treasurer to remit, refund and return any taxes erroneously or illegally assessed or collected and penalties collected without authority, and any tax that appears to have been unjustly levied or for an excessive amount or for any reason erroneously collected.

The authorization cannot, in fact, be more ample. The Treasurer acts by himself. He is called upon to judge the merits of each claim. By said Section 75 he is only charged with the duty of rendering a report to the Legislature of Puerto Rico, at the inception of each regular session, of all the transactions carried to effect by him in the exercise of said authorization.

The taxpayer is called upon to render his income tax return and, as soon as practicable after the filing of said return, the Treasurer of Puerto Rico shall examine the same and determine the exact amount of the tax.

If the taxpayer declares no taxable amount, or if he does not file a return, the deficiency shall be the excess of the tax over the amounts previously assessed. When he so determines, the Treasury shall notify the taxpayer and the latter, within thirty days from the date that the notice is deposited in the postoffice, may file an appeal with the Board of Review and Equalization stating the facts and grounds of his claim, in writing and under oath.

If the Board decides in favor of the taxpayer he shall not be liable for any part of the deficiency determined by the Treasurer and disallowed by the Board, and the

Treasurer shall have the right, within the term of one year, to institute an action in a district court of competent jurisdiction, without assessment, for the collection of any part of the amount so disallowed. Of course, in such an action the taxpayer shall have the opportunity to defend himself, and judgment shall be rendered in accordance with the facts and the law.

The foregoing is more clearly provided by Sections 54, 56 and 57 of the law. See also Sections 62 and 64.

Section 76(a) provides that the decisions of the Board shall be final and the taxpayer shall pay the tax under protest if he wishes to resort to the courts of justice.

Section 76 further provides that any actions so instituted by taxpayers shall have preference in the dockets of the courts, and the defendant shall set forth all his defenses at once and in one single writing and the case shall be promptly set and decided in one hearing.

Said section goes on to provide about the reconsideration by the said Board, and then commands that:

“(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.”

Does this subdivision (b) mean that after the Treasurer denies the claim and said denial is affirmed by the Board a claim for refund has to be filed and if the Treasurer refuses it appeal again to the Board in order to be able to resort to the courts of justice?

Such is the meaning, at first glance, of the terms of the law itself, and we so decided in the opinion rendered as grounds for the judgment which was made ineffective by the order of January 14th last.

Nevertheless, a careful consideration of the matter carries us to the conclusion that it is not possible that such was the intent of the legislator. Why such duplicity? If the Treasurer denies and the Board affirms his denial and the taxpayer pays under protest, why resort again to the Treasurer and why appeal again to the Board?

This court had already said in the case of *American Colonial Bank of Porto Rico vs. Domenech, Treasurer*, 43 D. R. R. 889, 891. "We also agree with appellant that, if after appealing to the Board of Review and Equalization a taxpayer pays under protest, it is not necessary, once payment is made, to resort to said Board. The legislative intent was to grant a cause of action after payment under protest. Nevertheless, when drafting the said opinion in this case, our previous opinions were overlooked and when our attention was called to that oversight a reconsideration was granted and the case was reopened for a new discussion and decision of the issues of the same.

It is therefore clear that when the taxpayer, feeling aggrieved by the income tax levied by the Treasurer, files his claim with said official and his claim is denied and he appeals to the Board, which also decides the case against him, and he then pays under protest, he may, within the term of thirty days fixed by Law No. 74 of 1925, Section 76, first paragraph, resort to the courts of justice without any other preliminary requisite, that is, without having to file a petition for refund with the Treasurer and without having to appeal again to the Board of Review and Equalization.

As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of jus-

tice without paying under protest. If said taxpayer feels aggrieved by the tax assessed, he may, within thirty days after being notified, appeal to the Board and obtain that said Board overrule the deficiency determined by the Treasurer, as provided in Section 57 of said law, and he may, if the decision of the Board is against him, pay under protest and, within thirty days after payment, resort to the courts of justice, availing himself of the right granted by Section 76 of the said law of 1925. He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice.

The non-existence of the appeal to the courts when payment is not made under protest is a matter already decided by this court in the case of *Compania Agricola de Cayey vs. Domenech, Treas.*, 47 D. P. R. 535, 539, as follows:

"It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by means of law suit also disappeared. From 1921 on the payment under protest was an express condition preliminary to the initiation of a law suit. Though the law of 1921, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the refund of the taxes could be obtained. And such was the general understanding. We have before us an illustrative chart prepared by the Economic Commission of the Legislature containing the laws now in force, and the law of 1919 is omitted therefrom. Generally, though the time elapsed is not so long, taking into consideration the contemporary construction, the law of 1919

is no longer in force. Therefore, though the law of 1925 granted the substantive right of filing appeal with the Treasurer even if the taxes were not paid under protest, said law did not keep in force or revive the remedy granted by the law of 1919."

The decisions in *Serralles vs. Treasurer*, 30 P. R. R. 220, and *McCormick vs. Bonner*, 44 D. P. R. 432, cited by the amicus curiae, are not applicable because they are based on the repealed law of 1919.

Therefore, under any phase that the case is considered the judgment appealed from should be affirmed.

=

Si

B. F

NAT

=

FILE COPY

U.S. - Supreme Court, et. 3

FILED

JAN 24 1939

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

VS.

YABUCOA SUGAR COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER,
IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

✓ WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
*Solicitor for the Department of the Interior,
Of Counsel.*



SUBJECT-INDEX

	Page
Point I—The 1923 amendments to Political Code were superseded in income tax cases by the complete Income Tax Code of 1925	1-5
Point II—The Treasurer's Regulations have nothing to do with this case	5-8
Point III—In relation to the question presented in this case of the conclusive character of the Treasurer's determination as to the merits of a claim under Section 75 of the Act of 1925, there is no confusion or contradiction whatever in the decisions in the Supreme Court of Puerto Rico, such as to warrant any disregard of the established rule concerning the respect to be shown to the decisions of a local Territorial Supreme Court interpreting local Territorial statutes	8-9
Point IV—The decision of the insular Supreme Court was clearly right	10-12
Point V—The supposed confusion or contradiction and errors, which the Respondent says it finds in the decisions of the insular Supreme Court with reference to the finality of the decision of the Treasurer upon a claim for refund of voluntary supposed overpayments, does not really exist. The decisions of the insular Supreme Court on this question are all in harmony with each other, and are clear and correct	12-15
Conclusion	15-16

TABLE OF CASES

	Page
Compania Agrícola de Cayey vs. Treasurer, 47 P. R. Dec. (Spanish ed.) 535	13,14
McCormick vs. Treasurer, 44 P. R. Dec. (Spanish ed.) 432	13
Porto Rico Fertilizer Co. vs. Rafael Sancho Bonet, Treasurer, 50 P. R. Dec. (Spanish ed.) 405	11,14
Puerto Rico vs. Shell Co., 302 U. S. 253	15
Serrallés vs. Treasurer, 30 P. R. Rep. 220	13

STATUTES

PUERTO RICO

Act No. 80, Income Tax Act of 1919	12, <i>et seq.</i>
Act No. 43, Income Tax Act of 1921	2, <i>et seq.</i>
Act No. 75 of August 2, 1923, amending Secs. 308, 310, and 313 of the Political Code of Puerto Rico	2, <i>et seq.</i>
Income Tax Act of August 6, 1925 (Act No. 74, the so-called "Income Tax Act of 1924")	1, <i>et seq.</i>

OTHER AUTHORITIES

Treasurer's Regulations of May 17, 1926	5, <i>et seq.</i>
Article 355	6-7, <i>et seq.</i>

IN THE
Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

vs.

YABUCOA SUGAR COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER,
IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

L

Respondent, in its Point "First" (*Brief*, pp. 10-13) contends that the insular Board of Review and Equalization has power under the Puerto Rican Income Tax Act of August 6, 1925 (the so-called "Income Tax Act of 1924") "to determine the correct amount of any income tax owing or thought to be owing by any taxpayer", and that the Board's power to entertain appeals is not limited to cases of "deficiency taxes".

Respondent contends that we are mistaken in saying (*Petitioner's Supporting Brief*, Points II and III, pp.

24 *et seq.*) that the Board of Review and Equalization is without power under the Act of 1925 to entertain any appeal or to bind the Treasurer by its decisions in any cases, other than those relating to "deficiency taxes" assessed by the Treasurer.

A. Respondent apparently concedes that there is nothing in the 1925 Act granting any jurisdiction to the Board in any cases other than those relating to deficiency taxes; and that the grant of jurisdiction to the Board in that Act, in deficiency cases, is, in form, a complete code relating to the jurisdiction of the Board in income tax matters, thereby impliedly excluding any broader or other jurisdiction in the Board.

B. Respondent contends, however, that the prior Act No. 75 of August 2, 1923 (Laws of 1923, pp. 604-610), amending sections 308, 310, and 313 of the Political Code of Puerto Rico, carries over, and remained in effect after the enactment of the Act of 1925, so as, in effect, to broaden the jurisdiction given to the Board by the 1925 Act, and to give the Board jurisdiction in all income tax cases, regardless of whether or not they are deficiency cases, in apparent contradiction of the provisions and intentions of the 1925 Act.

C. But respondent overlooks the facts that (1) the Act of August 2, 1923, upon which respondent relies, amending those sections of the Political Code in relation to the powers of the Board of Review and Equalization, so as to read as they are quoted by respondent (*Brief*, pp. 11-12) was enacted while the *Income Tax Act of 1921* was in effect (Act No. 43 of July 1, 1921, Laws of 1921, pp. 312-356); and that (2) under the 1921 Act, the taxpayer was not expected to pay his tax upon filing his income tax return. On the contrary, that Act contemplated that, in all cases, the amount of the tax to be paid should be

calculated and assessed by the Treasurer, some time after the taxpayer had made his return; and that the taxpayer was not expected to pay the tax until after it had thus been *assessed* by the Treasurer and notice of the amount thus assessed had been given to the taxpayer (Act of 1921, Secs. 19-26, 32, 38, 40, 41; Laws of 1921, pp. 334-346). So that, *in all cases*, there was an *assessment* by the Treasurer, and if the taxpayer objected to the assessment an appeal was provided for him to the Board of Review and Equalization (Act of 1921, Secs. 45-47; Laws of 1921, p. 348).

D. *It was in order to make the corresponding sections of the Political Code correspond to that scheme of assessment of the 1921 Income Tax Act*, that the Legislature enacted the Act No. 75 of August 2, 1923, upon which respondent now relies, amending sections 308, 310, and 313 of the Political Code.

E. *But that scheme for the payment of income taxes was revolutionized by the Income Tax Act of 1925, here involved.*

Instead of the taxpayer being expected to wait before payment of the taxes until after his tax return had been examined by the Treasurer and the amount of the tax calculated and assessed and notification of the amount given to the taxpayer with a request for payment, this new Act of 1925 requires the taxpayer to make payment immediately, coincidentally with filing his tax return, of the amount calculated by himself; and contemplates that he will not receive any notice from the Treasurer at all, *unless* the Treasurer afterwards finds that the taxpayer has not paid as much as the "correct amount of the tax", as determined by the Treasurer on subsequent examination of the tax return; and that, in such cases of underpayment (or of failure to pay) the Treasurer shall assess a "*deficiency tax*" and notify the taxpayer of the amount of such "*deficiency tax*"; and then that

the only office of the Board of Review and Equalization is to consider appeals from any such "deficiency tax" thus assessed by the Treasurer, to which a taxpayer may object.

~~That is an entirely new scheme~~, with which the former provisions for appeals to the Board, as contained in the 1921 Income Tax Act and in the 1923 amendments to the Political Code,—which, as above pointed out, were enacted in order to conform with the 1921 Act,—just do not fit at all.

F. The 1925 Act was not an amendment of the former 1921 Act; but was a complete new income tax code.

The 1925 Act is entitled:

"An Act to provide revenues for the People of Puerto Rico through the levying of certain income taxes, and for other purposes" (Laws of 1925, page 400),

and its first section provides:

"Section 1.—This Act shall be known as the 'Income Tax Act of 1924' " (Laws of 1925, page 400).¹

Furthermore, its Section 85 expressly provides (Laws of 1925, page 548):

"Section 85.—(a) Income Tax Law No. 43, approved July 1, 1921, as amended, is repealed as of January 1, 1924."

G. This new complete code, carrying this express repeal of the entire prior income tax system, necessarily superseded all contradictory provisions relating to the powers of the Board of Review and Equalization contained in the prior laws, whether in the 1921 Income Tax Act itself, or in the 1923 amend-

¹ Although not enacted until August 6, 1925. See our original Petition, footnote 3, p. 9.

ments of the Political Code which had been made in order to conform to the 1921 Act.² [Or, perhaps, it might be more accurate to say, with relation to those sections of the Political Code, that, necessarily, they are impliedly amended by the later 1925 Act, so that the powers and jurisdiction of the Board, on appeals in income tax cases, are thereafter to be such,—(*and such only*),—as are provided in the 1925 Act.]

H. It follows that, since the enactment of the 1925 Act, which is the *later expression of the legislative will*, the powers and jurisdiction of the Board are those granted it by that 1925 Act; and, in relation to income tax cases, *are only those*; and are none others.

I. Whence it results that, as was originally pointed out by this petitioner (**Supporting Brief, Points II and III**, pp. 24-27), the jurisdiction of the Board of Review and Equalization in income tax cases is now limited to appeals relating to “deficiency taxes”.

II

The Treasurer's Regulations have nothing to do with this case.

Respondent, in the latter part of its Point “Second” (*Brief*, at pp. 19-21), quotes regulations promulgated by the insular Treasurer (a predecessor of the present Treasurer), on May 17, 1926, and claims that they have a controlling effect here. Those are the same regulations to which reference was made by JUDGE BINGHAM in his

² And so, *vice versa*, it has finally been held that the still later amendment of the general tax laws by the Act of 1927 concerning the time within which to begin suits for tax refunds, does not affect this Income Tax Act of 1925, because this income tax act is *a complete code in itself*, covering the law with relation to income taxes. (*Confer*, last paragraph of JUDGE WILSON's opinion in the Circuit Court of Appeals; R. 40).

opinion in the Circuit Court of Appeals (R. 32-33), as we noted in our original Supporting Brief (p. 16; footnote 9), and to which neither of the other Judges of the Circuit Court of Appeals, nor the insular Supreme Court, paid any attention.

A. Aside from the fact that this is not a case of supporting any long-established administrative practice embodied in a rule of any administrative officer, or acted upon and enforced by the administrative officer in question and by the local courts,—*but the exact contrary*, because, here, *the Treasurer did not consider these regulations applicable, and did not apply them*, and the local courts likewise disregarded them and supported the action of the Treasurer here,—**these regulations**, on their face, **do not apply to this case**.

B. Respondent's counsel quote and rely on (*Brief*, pp. 19-20) Article 355 of the Regulations of May 17, 1926. On its face, its applicability hinges upon the first seventeen words of its sub-paragraph "(1)", which read:

"(1) When the taxpayer receives notice from the Treasurer that the income tax has been determined, he may: ***".

Then follow the several things that the taxpayer may do. But it all hinges on the taxpayer having thus received "*notice from the Treasurer that the income tax has been determined*". [Sub-paragraph ("2") follows along, after that original "notice" contemplated by sub-paragraph "(1)"].

C. Plainly, on its face, the language of that Regulation is a "hangover" from the language of some prior regulations that had been promulgated under the prior Income Tax Law of 1921, and were suitable to that law, under which, as hereinbefore point-

ed out (*ante*, pp. 2-3), the taxpayer was not required nor expected to make any payment at the time he filed his income tax return, but only after having, later on, received notice from the Treasurer that, as this Regulation phrases it, "the income tax has been determined".

The draftsman of this Regulation, issued the following Spring after the enactment of the new 1925 Income Tax Act, had apparently not completely grasped the revolutionary character of the change in the system of payment of income taxes contemplated by the new 1925 Act [*confer, ante*, pp. 3-5], and failed fully to adapt the language of the Regulation to the new system contemplated by the 1925 Act. But, in any event, taking the language of the Regulation just as it stands, and attempting to fit it in to the provisions of the 1925 Act, this language of the Regulation can, on its face, properly apply only to cases of "deficiency taxes".

D. Under the 1925 Act, it is only in the case of assessment of "deficiency taxes" that the taxpayer "receives notice from the Treasurer that the income tax has been determined", within the language of this Regulation as above quoted. That language of the Regulation aptly describes the notice of the assessment of deficiency taxes, which the Treasurer is required to send to the taxpayer by registered mail, under section 57(a) of the 1925 Act. And, upon receipt of such "notice", the taxpayer actually does have, under the 1925 Act, substantially the elections that are stated in this Regulation as quoted in Respondent's Brief (pp. 19-20).

But, under the 1925 Act, all of that language of the Regulation necessarily applies only to "deficiency taxes". All of this, by its own express wording, relates only to

what the taxpayer may do *after* he *has received* this "notice", under section 57(a) of the Act.³

E. Hence, in the present case, which does not relate to "deficiency taxes",—nor to any taxes paid after the taxpayer had received any kind of a "notice" from the Treasurer,—but relates, on the contrary, wholly to taxes voluntarily paid, under the Act of 1925, coincidentally with filing the taxpayer's income tax return and in accordance with the amount shown due by the taxpayer itself upon the face of its own return,—the insular courts were correct in disregarding this regulation, as did also JUDGES WILSON and MORTON in the Circuit Court of Appeals.

III

In relation to the question presented in this case of the conclusive character of the Treasurer's determination as to the merits of a claim under Section 75 of the Act of 1925, there is no confusion or contradiction whatever in the decisions in the Supreme Court of Puerto Rico, such as to warrant any disregard of the established rule concerning the respect to be shown to the decisions of a local Territorial Supreme Court interpreting local Territorial statutes. [Confer our "Point IV" (pp. 32-34) of our original Supporting Brief].

Respondent, in its point "Third" (*Brief*, pp. 21-26), discusses decisions of the Supreme Court of Puerto Rico relating to *other questions* under the income tax laws of that Territory, which appellant's counsel say were con-

³ Under the prior 1921 act, as above pointed out (*ante*, p. 3), the taxpayer received this "notice" before he was required or expected to make any tax payment at all; and hence the "notice" applied,—and this language of the Regulation (or substantially the same language under prior regulations) was, therefore, properly applicable,—to all income taxes; instead of, as under the present 1925 Act, only to "deficiency taxes".

fusing or contradictory. But, as we pointed out in a footnote to our original Petition for Certiorari (*Petition*, p. 18, footnote 12), in connection with JUDGE WILSON'S views on this point (substantially the same views now elaborated in Respondent's Brief), all of what is said in relation to "conflicting decisions", or supposed confusion in decisions of the insular Supreme Court, *relates to questions not here involved*, and does not at all affect the continuity of the unbroken chain of decision in the insular Supreme Court, followed and applied by that court in the present case, in relation to the question presented in this case. As we there said (*Petition*, p. 18, footnote 12):

"there are no 'conflicting decisions' of the insular Supreme Court upon the questions here involved of the supposed right of a taxpayer to appeal to the Board of Review and Equalization from the determination of the Treasurer under sections 54, 55, 64, and 75 of a claim for supposed voluntary overpayment, and of the supposed right of the taxpayer to maintain an action in court, such as this, practically in the nature of an appeal to the courts from the Treasurer's determination of such a claim for refund of voluntary supposed overpayment. On those questions *there is no conflict in the decisions of the Supreme Court of Puerto Rico*. That court has uniformly (and unanimously) held, in three decisions, including that in the present case, that the Treasurer's determination of such a claim for a refund is final; that that is a matter entrusted by those sections of the statute to the Treasurer's determination in his sound executive discretion; and the insular Supreme Court has never recognized any right of appeal from the Treasurer, from such a determination on a claim for refund of such voluntary payments, either to the Board of Review and Equalization, or to the courts."

The decision of the insular Supreme Court was clearly right.

A. In relation to voluntary income tax payments made by a taxpayer upon filing his own income tax return under the 1925 Act, the "mandatory duties" of the Treasurer are simply: (1) To examine the return and to "determine the correct amount of the tax" (Sec. 54); and (2) If the Treasurer finds that the taxpayer has overpaid the amount which the Treasurer has thus "determined to be the correct amount" of the tax (or of an installment) then to credit or refund the amount of such overpayment *as thus determined by the Treasurer* (Secs. 55, 64).

B. In addition, if the taxpayer, at any time within four years [Sec. 64(b)], claims that he has mistakenly, —although voluntarily and without any protest,—made any overpayment, then the Treasurer is "authorized" to refund any amount which he may find to have been "erroneously or illegally assessed or collected" or to have been "unjustly assessed or excessive in amount, or in any manner wrongfully collected", and to "make report to the Legislature of Puerto Rico" of such refund (Sec. 75).

C. Of course that provision of Section 75 of the Act, that the Treasurer is "authorized" to make such refunds, means that a mandatory duty is imposed upon him *to hear and determine and to judge* any such claims that may be presented to him; *but that is the extent of his mandatory duty* under that Section 75, viz., *to hear and to determine and to judge*.

If he performs that duty, if he accords the claimant a full and fair hearing, and regularly determines and judges the claim, then that is the end of it. The Legislature has provided no appeal from the Treasurer's de-

cision on such a claim. The Treasurer, under Section 75 in connection with Sections 54 and 55, determines the "correct amount of the tax", and makes such refund, if any, as, upon such hearing under Section 75, he finds to be correct.⁴

D. As the insular Supreme Court phrased it, in its opinion on rehearing in the *Fertilizer Company* case, July 23, 1936, in considering the powers and duties of the Treasurer under this Section 75 of the Act of 1925 (50 P. R. Dec. 405, 410-411, *Spanish Edition*; translations in Appendix III (p. 50) to our original Petition for Certiorari, and also in Appendix "B" (p. 36) to Respondent's Brief):

"The authorization cannot, in fact, be more ample. The Treasurer acts by himself. *He is called upon to judge the merits of each claim.* By said Section 75 he is only charged with the duty of rendering a report to the Legislature of Puerto Rico, at the inception of each regular session, of all the transactions carried to effect by him in the exercise of said authorization." (*Italics supplied*)

E. To "judge". That is the apt word to describe the Treasurer's powers under Section 75. He exercises *quasi-judicial power to hear and to determine*. That is the furthest removed from,—is, indeed, the exact antithesis to,—any uncontrolled or irresponsible "discretionary" power (*Respondent's Brief*, p. 9) to or to the indulgence of any "whim" of the Treasurer (JUDGE BINGHAM, R. 33).

⁴ Doubtless, if the Treasurer refused a proper hearing under Section 75, or proceeded in an irregular manner, or refused refund of an amount which he had himself determined had been excessively collected above the "correct amount of the tax" determined by him under Section 54, then *mandamus* would lie to compel him to do his duty. There is no suggestion in this record of any such abuse of the Treasurer's powers in the present case.

Nothing is left to the Treasurer's "whim" or to any uncontrolled "discretionary" power; but, as the insular Supreme Court holds, the *quasi-judicial* duty is imposed on the Treasurer to *judge* the merits of each claim. He is bound by the rules of fair play applicable to all hearings and decisions by administrative tribunals, as well as to the superior courts; but the Legislature had the undoubted power to provide, as it did by the Act of 1925, that, after this full hearing has been awarded, and after the Treasurer has performed his duty "to judge the merits of the claim", and has thus judged and decided it, then the taxpayer has no appeal to the courts from the the Treasurer's decision. It is final.⁵ [In the absence, of course, of any claim of irregularity in procedure, or of any abuse of that kind of the Treasurer's power. No such claim of irregularity is made in this record].

V.

The supposed confusion or contradiction and errors, which the Respondent says it finds in the decisions of the insular Supreme Court with reference to the finality of the decision of the Treasurer upon a claim for refund of voluntary supposed overpayments (*Brief*, pp. 22-25), does not really exist. The decisions of the insular Supreme Court on this question are all in harmony with each other, and are clear and correct.

A.—By section 66 of the Puerto Rican Income Tax Act of 1919, the Treasurer was given authority to consider claims for, and to "remit, reimburse or make restitution for" income taxes erroneously or unlawfully imposed or collected; but his decision was not made final. To the contrary, it was expressly provided that if the Treasurer "refuses without reason to grant such a claim", then "the aggrieved party may appeal to the courts of justice" (Act No. 80, Laws of Puerto Rico,

⁵ See our original Supporting Brief, Point I, pp. 23-24.

1919, p. 666; Appendix I to our original Petition for Certiorari, pp. 48-49).

B.—In cases arising under that Act of 1919, the Supreme Court of Puerto Rico held that, *in view of that express provision of the Statute* allowing “the aggrieved party” an “appeal to the courts of justice”, such an “appeal”, in the form of an action in the appropriate insular district court for a tax refund, would lie at the suit of “the aggrieved party”, the taxpayer, even though the original tax payment had been made voluntarily and without protest. *Serrallés vs. Treasurer*, 30 P. R. Rep. 220, 223-224; *McCormick vs. Treasurer*, 44 P. R. Dec. (Spanish ed.) 432, 438-440. [The same cases cited in our original Supporting Brief here (Point III, pp. 27-28).]

C.—By the Income Tax Law of 1921 (Act No. 43, Laws of Puerto Rico, 1921, pp. 312, 356; Appendix to our original Petition for Certiorari, p. 49) the entire Act of 1919 was repealed by the repealing clause, Section 66 of the Act of 1921. The 1921 Act was substituted as a complete new code. This 1921 Act contained no provision corresponding to Section 66 of the former 1919 Act, and no provision of any kind for refunds of income tax payments paid voluntarily and without protest.

D.—In view of that repeal by the 1921 Act of the former provision of Section 66 of the 1919 Act, the Supreme Court of Puerto Rico held in the *Compania Agrícola de Cayey* case, followed by that court in the present case, that (as quoted in our original Supporting Brief here, pp. 28-29) there no longer remained, from 1921 to 1925 [that is to say from the date of the enactment of the 1921 Act up until the enactment of the 1925 Act] any authority anywhere in the Puerto Rican governmental establishment, either in the Treasurer or in anybody else, to make refunds of voluntary income tax payments paid without protest.

E.—By section 75 of the Income Tax Act of 1925, authority was again given to the Treasurer to consider such claims, and to make such refunds, and to report his actions to the Legislature. But this authority was given in somewhat different form from that given by Section 66 of the former 1919 Act, and the provision contained in Section 66 of the 1919 Act permitting the taxpayers recourse to the courts from the Treasurer's decisions on claims for such refunds, *was entirely omitted* from Section 75 of the 1925 act. And, as is pointed out in our original Supporting Brief here (Point III, pp. 27-32), *that omission was manifestly purposeful on the Legislature's part*. It is believed that nothing further need be added to what is there said in our Supporting Brief as to *the deliberate intention of the Legislature* in omitting that provision from the 1925 Act.

F.—Under those circumstances, and in view of that legislative history, and of the deliberate omission by the Legislature from Section 75 of the 1925 Act of the provision which it had put into the corresponding Section 66 of the earlier 1919 Act, the Supreme Court of Puerto Rico, following its decision in the *Compania Agrícola de Cayey* case *supra* (*Compania Agrícola de Cayey vs. Treasurer*, 47 P. R. Dec. [*Spanish ed.*] 535, 538-540), held on rehearing, July 23, 1936, in the *Porto Rico Fertilizer Company* case, *supra* (50 P. R. Dec., *Spanish ed.*, 405, 410-414; translation in Appendix III (pp. 50-54) to our Petition for Certiorari here, and also in Appendix "B" (pp. 32 *et seq.*) to Respondent's Brief in Opposition),—and followed and adhered to it in the present case, that, as quoted in our original Petition for Certiorari (pp. 14-15),

"As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of justice without paying under protest.*** He may also, though he has not paid under protest, if he

considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice."

G. As we have said, the decisions of the Supreme Court of Puerto Rico upon this point are plain and free from confusion.

They are in harmony with each other. They clearly trace the development of the legislation. They are reasonable. They are all unanimous. The power which they hold that the Legislature exercised, to make the determinations of the Treasurer final under Section 75 of the 1925 Act, is clearly a power within the legislative authority vested in the Legislature of Puerto Rico by the Organic Act of the Congress, by which that Legislature has been invested in such matters with powers "nearly, if not quite, as extensive as those exercised by the State legislatures". *Puerto Rico vs. Shell Co.*, 302 U. S. 253, 262. [And confer our original Supporting Brief, Point I, pp. 23-24].

H. Under these circumstances, there should be accorded to these unanimous and harmonious decisions of the Supreme Court of Puerto Rico the respect regularly accorded by the established rule to decisions of a Territorial Supreme Court interpreting local Territorial statutes.

CONCLUSION

JUDGE MORTON was right in holding that this judgment of the insular Supreme Court, affirming that of the District Court of San Juan, was correct, and should be affirmed.

The question here presented is of public importance. The writ of certiorari should issue, and after hearing the judgment of the Circuit Court of Appeals should be reversed, and that of the insular Supreme Court affirmed.

WILLIAM CATTRON RIGBY,

Attorney for Petitioner

B. FERNANDEZ GARCIA,

Attorney General of Puerto Rico,

NATHAN R. MARGOLD,

*Solicitor for the Department of the Interior,
Of Counsel.*





FEB 14 1938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

vs.

YABUCOA SUGAR COMPANY,
Respondent.

BRIEF FOR PETITIONER

✓ WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
*Solicitor for the Department of the Interior,
Of Counsel.*



SUBJECT-INDEX

	Page
Introduction	1-2
Questions Presented	2-3
Statutes.....4-7; Appendices I and II.....	49-61;
and Appendix IV.....	66-68
Bearing of the Statutes on this case.....	7-9
Statement of the Case	9-15
Opinions of the Circuit Court of Appeals	15-18
Petitioner's Contention	18-20
Opinions Below	21
Jurisdiction	21
Specification of errors to be urged	21
Summary of Argument 21; Petitioner's Contention	18-20
Argument	22-46
Point I—The Legislature of Puerto Rico was under no obligation to provide taxpayers any recourse to the courts from insular Treasurer's "determination" of "correct amount of the tax", upon taxpayers' petitions for refunds of supposed overpayments made voluntarily and without protest; Legislature may properly make Treasurer's determination final in such cases	22-23
Point II—The negative prohibitory language of section 76(b) of the Puerto Rican Income Tax Act of 1925 does not evidence any intent on the part of the Legislature thereby to make any affirmative grants of power either (a) to the Board of Review and Equalization to entertain any appeals or to bind the Treasurer by its decisions in any cases other than those	

relating to deficiency taxes assessed by the Treasurer, or (b) to grant to the taxpayers any recourse to the courts, or to the courts any jurisdiction to entertain taxpayers' suits to review the Treasurer's determination of the correct amount of the tax, in any cases other than those relating to "deficiency taxes" 23-25

Point III—The limitations placed by the Income Tax Act of 1925 upon the jurisdiction of the Board of Review and Equalization with relation to income taxes are not enlarged or affected in any way by the earlier Act of August 2, 1923, amending sections 308, 310, and 313 of the Political Code with relation to the general powers of the Board. With relation to income taxes, the later Income Tax Act is a complete code in itself 25-29

Point IV—It is particularly significant of the intent of the Legislature not to permit any recourse to the courts from the Treasurer's determination of the correct amount of the tax (or any appeal to the Board of Review and Equalization), except in relation to deficiency taxes, that, in drafting sections 75 and 76(b) of the Act of 1925, it entirely omitted provisions appearing in cognate sections of the earlier Puerto Rican Act of 1919, and of the federal Revenue Act of 1924, respectively, upon which these Sections 75 and 76(b) are otherwise closely modeled, and which would have permitted recourse to the courts from all tax determinations of the Treasurer, had the Legislature seen fit to follow them in drafting this Act of 1925 29-35

	Page
Point V—The opinions of the majority members of the Circuit Court of Appeals, Judges Bingham and Wilson, erred in failing to apply here the established rule that the decision of a Territorial Supreme Court, such as the Supreme Court of Puerto Rico, construing a local statute of the Territory, will be followed unless “clearly erroneous”; and further erred in failing to recognize that the decision of the Supreme Court of Puerto Rico in this case was, in any event, not “ <i>clearly erroneous</i> ”, and, therefore, should have been followed, under this rule	35-36
Point VI—The decision of the insular Supreme Court was clearly right	37-39
Point VII—The supposed confusion or contradiction, which Judge Wilson finds (R. 37) in decisions of the insular Supreme Court, does not exist with reference to the finality of the decision of the Treasurer upon a claim for refund of voluntary supposed overpayments. The decisions of the insular Supreme Court, on this question, are all in harmony with each other, and are clear and correct.	39-42
Point VIII—The Treasurer’s Regulations have nothing to do with this case.	42-45
Point IX—The opinions of the majority Judges of the Circuit Court of Appeals erred in overlooking or ignoring the <i>second</i> or “ <i>subsidiary</i> ” question presented on the record in this case. (“Questions Presented”, p. 3)	45-46
Conclusion	46-47
Appendices	49-68

Appendix I—Pertinent Sections of Puerto Rican “Income Tax Act of 1924”, Act of August 6, 1925, and of Income Tax Acts of 1919 and 1921	49-61
Appendix II—Section 1014 of Federal “Revenue Act of 1924”, Act of June 2, 1924, c. 234, 43 Stat. 343	61
Appendix III—Pertinent portion of opinion of Supreme Court of Puerto Rico in the <i>Fertilizer Company</i> case	62-66
Appendix IV—Political Code, Secs. 308, 310 and 313, as amended by Act of August 2, 1923	66-68

TABLE OF CASES

American Colonial Bank v. Domenech, Treasurer, 43 P. R. Dec. 889	64
Cardona v. Quinones, 240 U. S. 83	36
Chesebrough v. United States, 192 U. S. 253	23
Compañía Agrícola de Cayey, Ltd. v. Domenech, Treasurer, 47 P. R. Dec. 535 (Spanish ed.)	13, 14, 30, 31, 35, 41, 46, 65
Curtis' Adm'x. vs. Fiedler, 2 Black 461	23
De Villaneuva v. Villaneuva, 239 U. S. 293	36
Dismuke v. United States, 297 U. S. 167	19, 20, 22
Domenech v. Verges, 69 F. (2d) 714	35-36
Elliott v. Swartwout, 10 Pet. 137	23
Loiza Sugar Co. v. People of Puerto Rico, 57 F. (2d) 705	36
Little v. Bowers, 134 U. S. 547	14, 19, 20, 23
Moore Ice Cream Co. v. Rose, 289 U. S. 373	19, 20, 23, 34-35

	Page
McCormick v. Bonner, Treasurer, 44 P. R. Dec. 432 (Spanish ed.)	30,40,66
People of Puerto Rico v. Shell Co., 302 U. S. 253	19,20,22-23,42
People of Puerto Rico v. Rosaly, 227 U. S. 270	19,20,22
Porto Rico Coal Co. v. Domenech, 41 F (2d) 183	36
Porto Rico Fertilizer Co. v. Rafael Sancho Bonet, Treasurer (No. 3274, Circuit Court of Appeals) 2, <i>et seq.</i> ; and Appendix III	62-66
Richardson v. Fajardo Sugar Co., 327 Fed. 195	36
Russell & Co. v. Sancho Bonet, Treasurer, 92 F. (2d) 821	36
Serrallés v. Treasurer, 30 P. R. Rep. 220	30,40,66
United States v. Babcock, 250 U. S. 328	22
United States v. N. Y. & Cuba Mail S. S. Co., 200 U. S. 488	23

STATUTES

FEDERAL

Act of Congress of April 12, 1900, "Foraker Act"	22
Act of Congress of March 2, 1917, "Organic Act"	22
"Revenue Act of 1924", Act of June 2, 1924	
Sec. 1014 (a) (Sec. 3226 Rev. Stats.)	33-34
and Appendix II	61

PUERTO RICO

Act No. 80, Income Tax Act of 1919	
Sec. 66	29-31,34,39-41, and Appendix I 60-61
Act No. 43, Income Tax Act of 1921	
Sec. 63	26-27, <i>et seq.</i> , and Appendix I 61
Act No. 75 of August 2, 1923, amending Secs. 308, 310, and 313 of the Political Code of Puerto Rico, 26,27, <i>et seq.</i> , and Appendix IV	66-68

	Page
Act No. 74, Income Tax Act of August 6, 1925 (the so-called "Income Tax Act of 1924")	
Sec. I	28
Secs. 22 and 23	Appendix I 49-50
Secs. 24-27	4
Sec. 27(a)	Appendix I 50-51
Secs. 37-45	4
Sec. 37(a)	Appendix I 51-52
Sec. 39(a), (b)	Appendix I 52
Sec. 53	4, and Appendix I 52-53
Secs. 54, 55	4, and Appendix I 53
Secs. 56, 57	5, and Appendix I 53-54
Sec. 57(a)	25 <i>et seq.</i> , and Appendix I 54
Secs. 58 and 59	5
Sec. 60	5, and Appendix I 55
Secs. 62 and 63	5 <i>et seq.</i>
Sec. 62(b)	25 <i>et seq.</i> , and Appendix I 55
Sec. 64	5 <i>et seq.</i> , and Appendix I 55-57
Sec. 65	5, and Appendix I 57-59
Secs. 66, 67	5
Sec. 68	5, and Appendix I 59
Secs. 69-74	6
Sec. 75	6 <i>et seq.</i> , and Appendix I 59
Sec. 76(a), (b), (c)	6-7, <i>et seq.</i> , and Appen- dix I 59-60
Sec. 85	28

IN THE
Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

VS.

YABUCOA SUGAR COMPANY,
Respondent.

BRIEF FOR PETITIONER

INTRODUCTION

This case presents the question whether, under the Income Tax Law of Puerto Rico, a taxpayer may maintain an action in court, practically in the nature of an appeal from the insular Treasurer's decision, for a refund, in an amount greater than determined by the Treasurer, of supposed over-payments of income taxes paid voluntarily and without protest upon the taxpayer's own income tax return.

The insular Supreme Court, affirming the District Court, and following its own prior decisions, held the Treasurer's decision final in such a case.

The Circuit Court of Appeals, First Circuit, reversed. This Court granted certiorari (R. 45).

The decision of the Circuit Court of Appeals was by a divided court. Each of the three Judges wrote a separate opinion covering this case and the companion case of *Porto Rico Fertilizer Co. vs. Rafael Sancho Bonet, Treasurer of Puerto Rico*, No. 3274 in that court, but PRESIDING JUDGE BINGHAM and JUDGE WILSON concurred in the result of affirming the judgment of the Supreme Court of Puerto Rico in the *Fertilizer* case, although reversing it in this case; while JUDGE MORTON concurred in affirming the judgment in the *Fertilizer* case, but dissented from the reversal in this case, holding that both judgments should be affirmed.

Both cases were actions at law to recover supposed over-payments of income taxes paid voluntarily and without protest upon plaintiffs' own original income tax returns under the Puerto Rican Income Tax Act of 1925. They differed in that the *Fertilizer Company* had not sought an appeal from the insular Treasurer's determination to the Board of Review and Equalization; whereas the present respondent, the sugar company, had done so. JUDGE BINGHAM says (R. 31): "In no other particular do the rights of the plaintiffs to maintain their causes of complaint differ".

This petitioner believes that the opinion of JUDGE MORTON is correct, and that the judgment of the Supreme Court of Puerto Rico (affirming that of the District Court) should have been affirmed in this case, as well as in the *Fertilizer* case.

QUESTIONS PRESENTED

The primary question is, as above stated, whether a taxpayer may maintain an action in court under the Income Tax Law of Puerto Rico against the Treasurer for a refund of supposed over-payments of income taxes

paid voluntarily and without protest in accordance with the taxpayer's own income tax return; or whether, upon a request or petition for such a refund, the taxpayer is concluded by the Treasurer's "determination" of the "correct amount of the tax", and of the refund, if any, to be made, under sections 54, 55, 64, and 75 of the Income Tax Act.

A subsidiary question is whether the Board of Review and Equalization has any jurisdiction to review and to bind the Treasurer by its decision on such a question of voluntary payments without protest; or whether its jurisdiction, and its power to bind the Treasurer by its decisions, is not limited to determining, solely, questions relating to **deficiency taxes** assessed by the Treasurer.

This petitioner believes that the primary question should be answered in the negative, and likewise the subsidiary question; that is to say, firstly, that the taxpayer is finally concluded by the Treasurer's determination of the correct amount of the tax due, upon a petition for refund of income taxes voluntarily paid without any protest in accordance with the taxpayer's own calculation of the tax upon his own tax return; and, secondly, that, upon such a question, the Board of Review and Equalization has no jurisdiction and no power to bind the Treasurer by its decision,—that, with relation to income taxes, its jurisdiction is limited solely to questions of the validity and amount of deficiency taxes assessed by the Treasurer.

This position is in accordance with the decisions of the insular courts, the District Court and the Supreme Court of Puerto Rico, in the present and earlier cases, and with the dissenting opinion of JUDGE MORTON in the Circuit Court of Appeals.

But JUDGES BINGHAM and WILSON held the contrary, although in separate opinions, in which, however, they concurred in their results.

STATUTES

Pertinent provisions of the Income Tax Act of Puerto Rico of August 6, 1925 (the so-called "Income Tax Act of 1924", as it is styled by section 1 of the Act) are in the Appendix, together with a few pertinent sections of the earlier Income Tax Acts of Puerto Rico of 1919 and 1921, and of the federal revenue laws.

Sections 24 to 27 of the Income Tax Act of 1925 provide for income tax returns to the Treasurer by individual taxpayers and fiduciaries, and sections 37 to 45 for returns by corporations, partnerships, and insurance companies.

Section 53 (Appendix, *infra*, pp. 52-53) provides for payment by the taxpayer (with some exceptions not pertinent here) on or before the 15th day of March (or of the third month following the close of the taxpayer's fiscal year), with a privilege of payment in two installments, and provisions allowing some further extension in some circumstances.

Section 54, entitled "Examination of Return and Determination of Tax", provides (Appendix, *infra*, p. 53) that, "as soon as practicable after the return is filed",

"The Treasurer shall examine it and shall determine the correct amount of the tax".

Section 55, entitled "Overpayments", provides (Appendix, *infra*, p. 53):

"If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 64."

Sections 56, 57, and 58 relate to "Deficiency Taxes" to be assessed by the Treasurer in case the taxpayer's return does not show any amount as the tax to be paid, or shows an amount less than the Treasurer "determines" that the tax should be, and for taxpayers' appeals to the Board of Review and Equalization from the Treasurer's determinations of such deficiency taxes; Section 59 deals with "Additions to the tax in cases of delinquency"; Section 60 with periods of limitation of time on the assessment of taxes; Section 62 with "Claims in Abatement" of "deficiency taxes" assessed by the Treasurer under section 57; and Section 63 with "Taxes under prior Acts" [not here involved].

Section 64, entitled "Credits and Refunds" (Appendix, *infra*, pp. 55-57) provides:

"(a) Where there has been an overpayment of any income or excess-profits tax imposed by this Act, or by Income Tax Act No. 59 of 1917, Income Tax Act No. 80 of 1919, and Income Tax Act No. 43 of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

Paragraph (b) of Section 64 allows a claim for such a credit or refund to be filed at any time within *four years* from the time the tax was paid.

Section 65 relates to taxpayers intending to depart from Puerto Rico; section 66 directs the Act to take effect retroactively as of January 1, 1924; section 67 makes certain "administrative, special, or stamp provisions of law" applicable in administering the Act; and section 68 (Appendix, *infra*, p. 59) authorizes the Treasurer to prescribe "all needful rules and regulations for the enforcement of this Act".

Section 69 requires taxpayers to keep records; sections 70, 71, and 72 deal with failure to make returns, false or fraudulent returns, and examinations of taxpayers' records by the Treasurer; section 73 with payments made upon compromise agreements; and section 74 with "retroactive regulations". None of these matters is here involved.

Section 75, entitled "**Refunds**", provides (Appendix, *infra*, p. 59):

"Section 75.—The Treasurer is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to The Legislature of Porto Rico at the beginning of each regular session of all transactions under this section."

Section 76 is entitled "**Limitations upon Suits and Proceedings by the Taxpayer**". It provides: (Appendix, *infra*, pp. 59-60):

"Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Porto Rico.

"Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence, and the hearing shall be set promptly for final decision.

"If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case

sufficient legal grounds and facts for applying again to the Board for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of Porto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

“(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.

“(c) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.”

BEARING OF THE STATUTES ON THIS CASE

The controversy here centers principally around the application of sections 54, 55, 64, 75, and 76, *supra*, of the Act of 1925.

It is perfectly plain that, as JUDGE MORTON said in his opinion in the Circuit Court of Appeals (R. 40-41):

“There is no disagreement as to the general scheme of the statute under discussion. Income taxes imposed by it fall into two classes (1) those shown to be due on the face of the return, and paid voluntarily without objection or protest, (2) those collected on deficiency assessments. In regard to the latter there are careful and adequate provisions. (Sections 57 and 76(a).) If deficiency assessments are objected to the taxpayer

may appeal to the Board of Review; if the Board of Review decides against him he must pay, and may sue in the courts to recover back the alleged illegal exaction.

"The present case does not relate to deficiency taxes; it concerns only taxes which were voluntarily paid without protest and deals only with claims for refund. The statute provides very specifically for the return of overpayments without any requirement of objection or protest against the original payment. (Sections 53,¹ 64). These sections apply to voluntary overpayments, made presumably by mistake on the part of the taxpayer. It also authorizes and directs the Treasurer to repay erroneous or illegal collections and to report annually to the Legislature his transactions under this authority. (Section 75). While no express provision is made therefor it is not doubted that a person who has voluntarily overpaid his tax may apply to the Treasurer under these sections for a refund; and it is clearly the Treasurer's duty if overpayment is established to make a proper refund. The crucial question is who is to determine whether there has been overpayment of a tax voluntarily paid, i.e. to pass on such claims for refund."

The Supreme Court of Puerto Rico held (R. 23-24), following its own prior decisions in the *Fertilizer* case, *supra*, and in an earlier case, that, on such a claim, the Treasurer's "determination" of the amount of the tax, under sections 54, 55, 64, and 75, was conclusive, and [in the absence of fraud or wilful abuse of authority, not here involved] could not be reviewed by the courts.

JUDGE MORTON agrees (R. 41-42); and, calling attention to the fact that what is here involved is a question of the construction of a local Territorial statute by the local Territorial Supreme Court, adds (R. 42):

"It has often been said that in matters of local law

¹ The figure "53" is manifestly a clerical error. This should read: "(Sections 55, 64)." *Confer* Appendix, *infra*, pp. 52-53; 53.

the opinion of that court is not to be set aside unless clearly wrong. As I have said I incline to think the Supreme Court of Puerto Rico was right; I certainly do not think it was clearly wrong."

He holds (R. 41-42) that section 76(b) has no application here.

To the contrary, JUDGES BINGHAM and WILSON find (R. 32-34, and 37-40) in section 76(b) grants of authority, both: (a) To the taxpayer, to appeal to the Board of Review and Equalization from the Treasurer's determination in such a case, and for the Board to entertain the appeal, and to bind the Treasurer by its decision; and (b) To the courts, to entertain an action by the taxpayer to review the Treasurer's determination.

As above stated, this petitioner, the Treasurer of Puerto Rico, believes that JUDGES BINGHAM and WILSON are in error in this holding; and that JUDGE MORTON is right in agreeing with the unanimous decision of the Justices of the Supreme Court of Puerto Rico.

STATEMENT OF THE CASE

This was an appeal by the plaintiff-respondent sugar company to the Circuit Court of Appeals from a judgment of the Supreme Court of Puerto Rico dismissing the company's appeal from the insular District Court of San Juan and affirming the judgment of the District Court on the ground that the sole question involved in this suit had already been decisively determined adversely to the plaintiff company's contentions, in earlier decisions of the insular Supreme Court, followed in the present case (R. 18).

The company, a corporation of Puerto Rico, brought this suit against the insular Treasurer,² in the insular

² *As Treasurer*; not against him individually. The suit was originally brought against the former Treasurer, Manuel V. Domenech (R. 1-2); but his successor in office, the present Treasurer RAFAEL SANCHO BONET, was afterwards substituted as defendant (R. 27).

District Court of San Juan, for refund of a supposed over-payment of \$6803.66 alleged to have been voluntarily over-paid by it by mistake in paying to the insular Treasury \$25,234.92 on the company's own tax return for its insular income taxes for its fiscal year 1927, under the Puerto Rican Income Tax Act of 1925.³ Later on, the Treasurer assessed a "deficiency tax" of \$1301.51, from which the company appealed to the Board of Review and Equalization which overruled the Treasurer as to the "deficiency tax," *and also found that the company had in fact over-paid the Treasury \$6803.66 in making its original income tax payment ("Amended Complaint", R. 2-6).* It appears ("*Amended Complaint*", Pars. VII to X; R. 4-6) that the Board differed in opinion, both from the Treasurer and from the sugar company, as to the amount of the credit to be allowed the company on its item of "Repairs", for the preceding year 1926, carried over to the year here in question, of 1927.

No facts are alleged in the "Amended Complaint" from which it is possible to draw any independent conclusion as to the correctness of the decision of the Board of

³ Act No. 74 approved August 6, 1925 (Laws of Puerto Rico, 1925, pp. 400-550). The nomenclature is confusing, because Section 1 of the Act provides (Laws of 1925, p. 400):

This Act shall be known as the "Income Tax Act of 1924".

To avoid confusion, it will be referred to throughout this Brief as the "Act of 1925", or as the "Income Tax Act of 1925". There is no other "Income Tax Act of 1924" of Puerto Rico.

⁴ Nor appear anywhere else in the record; because the Treasurer's demurrer to the "Amended Complaint" was sustained by the District Court, and the sugar company elected not to amend, but to appeal directly to the insular Supreme Court (R. 8, 10, 17).

Review and Equalization, or as to whether the taxpayer itself was not really correct in its original calculation upon which it had made its own voluntary tax payment, or as to whether the Treasurer was not correct either in his original determination upon which he assessed the deficiency tax, or in his second determination, after the first decision of the Board, in which he receded from the deficiency tax and determined that a refund of \$525.56,—but of that amount only,—was due the company, as hereafter stated. The “Amended Complaint” contains no allegations as to the character of the “Repairs” involved. It relies wholly upon an assumption that the Treasurer was bound by the decision of the Board, not only as to the deficiency tax, but also as to the supposed voluntary overpayment by the taxpayer upon the face of its own original tax return.

It is alleged (“Amended Complaint”, Par. XI; R. 6) that, after the Board’s first decision, the plaintiff sugar company, in February, 1930, filed with the Treasurer “a petition for refund or credit”, which was decided by the Treasurer the following month, March 28, 1930,

“by granting to the plaintiff a credit or refund in the amount of \$525.56, instead of the sum claimed by the plaintiff in accordance with the above ruling of the Board of Review and Equalization”;

that (Par. XII; R. 6) the plaintiff sugar company, the next month, in April, 1930, took a second appeal to the Board from this decision of the Treasurer on its petition for refund or credit; and that the board, more than two years later, on August 22, 1932, decided that second appeal, “by affirming its original ruling of December 23, 1929, entered in the appeal taken with regard to the deficiency”.

The plaintiff’s claim is (“Amended Complaint”, Par. XIII; R. 6) that the Treasurer “in granting to the plaintiff a refund for taxes in the amount of \$525.56, plus \$60.21 for interest, instead of \$6803.66, plus the interest claimed

by the plaintiff, has done so in an arbitrary, unlawful, capricious and wilful manner, and without any authority or power to do so, thus altering and modifying the ruling of the Board of Review and Equalization and disobeying the terms of said ruling”.

As above stated, there are no allegations of facts upon which any independent determination can be based as to the correctness of the calculations of the several parties—the Board, or the Treasurer, or the plaintiff itself upon its original payment on the face of its own tax return,—as to the item of the plaintiff’s “Repairs” for the preceding year of 1926, upon which their ideas differed.

The “Amended Complaint” is based wholly upon the assumption that the Treasurer was bound by the decision of the Board,—not only as to the deficiency tax, but also as to the petition for refund of the supposed over-payment voluntarily made in the original payment of the tax without protest in accordance with plaintiff’s own income tax return; and that the Treasurer, in “disobeying” the terms of the Board’s ruling, necessarily, as a matter of law, acted “in an arbitrary, unlawful, capricious and wilful manner, and without any authority or power to do so” (“*Amended Complaint*”, Par. XIII, *supra*, R. 6).

It is not alleged that the Plaintiff sugar company made any second request or petition to the Treasurer for refund or credit in accordance with the Board’s ruling, after the Board’s second decision of August 22, 1932. The company appears directly to have begun this suit against the Treasurer for the amount of the refund which the Board thought due it.⁵

⁵ The transcript of the record fails to show the date this suit was begun in the District Court. The “Amended Complaint” (R. 1-7) is dated July 11, 1933 (R. 7-8), nearly a year after the Board’s second decision of August 22, 1932. But in the meantime there had apparently been an original complaint, the proceedings upon which do not appear in the transcript of the record here; which begins (R. 1) with the “Amended Complaint”.

The defendant-appellee, the insular Treasurer, demurred (R. 8) on the ground that the payment had not been made under protest, but was voluntary. The District Court sustained (R. 9-10) the demurrer, and denied (R. 16-17) plaintiff's motion for rehearing. As stated, the insular Supreme Court dismissed plaintiff's appeal to it from the District Court, and on July 28, 1936, affirmed the District Court's judgment "because the tax was not paid under protest", in view of its own prior decisions, saying (R. 18):

"* * * this court held on the 24th instant in *Porto Rico Fertilizer Co. vs. Domenech, Treasurer*,⁶ following that of *Compañía Agrícola de Cayey, Ltd., vs. Domenech, Treasurer*, 47 P. R. R." (47 P. R. Dec. 535 (*Spanish edition*), September 29, 1934), "that without payment under protest resort may not be had to the courts of justice from the ruling of the Treasurer."

On the plaintiff company's motion for reconsideration, the insular Supreme Court adhered to its decision in the present case, saying, March 17, 1937, in denying the motion for reconsideration (R. 23-24):

"The appellant sought to recover the excess payment from the Treasurer. Under Section 75 of Act No. 74 of 1925 (Session Laws, p. 400)" [at pp. 536-538; Appendix, *infra*, p. 59], "which under our most recent opinion (*Puerto Rico Fertilizer Company vs. Domenech*) we have held the act to be applicable, the Treasurer is authorized 'to remit, to refund and pay back all taxes erroneously or illegally assessed or collected * * *.'"

⁶ The *Fertilizer Company* case, *supra*, 49 P. R. Dec. 45 (*original opinion*), 50 *ib.* 405 (*rehearing*), and 51 *ib.* 67 (*second rehearing denied*), No. 3274 in the Circuit Court of Appeals, which was affirmed in the same opinions in which the present case was reversed by that court. Pertinent portion of the opinion on rehearing (50 P. R. Dec., at pp. 413-414, *supra*; *Spanish edition*; *English edition not yet published*) is in Appendix III, *infra*, pp. 62-66.

"This is a discretionary matter in the treasurer and our direct decision in the *Puerto Rico Fertilizer [Company]* case is that the said section gives the taxpayer no additional right to file a suit for the recovery of taxes. It makes no difference what the method taken by the taxpayer in the *Puerto Rico Fertilizer Company* case was, for we feel bound to hold without special reference to the procedure in that case, that its reasoning and the reasoning of this case compels us to declare that the appellant is without remedy by suit.

"Taxes voluntarily paid in the absence of a statute authorizing it can not ordinarily be recovered. *Little v. Bowers*, 134 U. S. 54" [should read p. 547]; "61 C. J. 985. It is true that under Act No. 80 of 1919 a direct suit was allowed against the Treasurer to recover taxes voluntarily paid. Since 1921, however, the right to bring suits for the recovery of taxes other than those paid under protest has been abrogated. *Compañía Agrícola de Cayey, Ltd., v. Domenech*, 47 P. R. R. [47 P. R. Dec. 535, *supra*]. The mere fact that the Legislature gave a taxpayer the right to recover under certain circumstances does not confer that right under different circumstances, namely, when a person does not pay under protest.

"By legislative enactment a payment under protest is a condition precedent to recovery by suit.

"The motion for reconsideration should be denied."

In the *Porto Rico Fertilizer Company* case, to which the Supreme Court of Puerto Rico made reference in its opinion in this case, as above quoted (*Porto Rico Fertilizer Co. vs. Manuel V. Domenech, Treasurer of Puerto Rico, supra*) that court said upon rehearing, July 23, 1936,⁷

⁷ 50 P. R. Dec. 405, 415 [*Spanish edition; English edition, not yet published*]; translation appearing on page 30 of the Record in that case in the Circuit Court of Appeals, No. 3274 (Appendix III, *infra*, pp. 64-65; Confer footnote 6, *ante*, p. 13).

"As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of justice without paying under protest. If said taxpayer feels aggrieved by the tax assessed, he may, within thirty days after being notified, appeal to the Board and obtain that said Board overrule the deficiency determined by the Treasurer, as provided in Section 57 of said law, and he may, if the decision of the Board is against him, pay under protest and, within thirty days after payment, resort to the courts of justice availing himself of the right granted by Section 76 of the said law of 1925. He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice."

OPINIONS OF THE CIRCUIT COURT OF APPEALS

In the Circuit Court of Appeals, no two of the judges wholly agreed with each other. Each of the three judges filed his own separate opinion; but, as above stated, PRESIDENT JUDGE BINGHAM and JUDGE WILSON concurred in the results, affirming the judgment of the insular Supreme Court in the *Fertilizer* case, and reversing in the present *Yabucoa Sugar Company* case.

JUDGE MORTON agreed with the affirmance in the *Fertilizer Company* case, but dissented from the reversal in the present case, saying: "I think both judgments should be affirmed" (R. 43).

PRESIDENT JUDGE BINGHAM's opinion (R. 29-34), after noting (R. 33) that

"Section 75 authorizes the Treasurer 'to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, or penalties collected without authority, and all taxes that appear to be unjustly assessed and excessive in amount, or in any manner wrongfully collected,' "

concludes (R. 33) that:

“ * * Section 76(b) was intended to authorize the maintenance of a suit against the Treasurer, in case he refused to pay back the illegal or excessive tax collected, as he was authorized and directed to do under Sections 75, 65,⁸ and 64. It certainly could not have been the intention of the law maker to leave the payment of the taxpayer's just claim *solely* to the whim of the Treasurer.”

JUDGE BINGHAM, in effect, ignored⁹ the question *whether or not the Board of Review and Equalization has jurisdiction* of an appeal from the Treasurer's determination of the amount of the refund, if any, to be allowed a taxpayer on his petition for refund of *supposed overpayments* of income taxes paid voluntarily and without protest in accordance with the taxpayer's own tax return [*as contradistinguished from an appeal from a deficiency tax assessed by the Treasurer*], and assumed without further argument or discussion that the amount found by the Board of Review and Equalization to be an over-payment is necessarily “justly due” the sugar company, saying (R. 32):

“ * * the sole question is whether it can maintain a

⁸ Apparently, this should read “55”, as should also his reference to “Section 65”, in the sixth line of page 33 of the Record.

⁹ Except for saying, in commenting on the Treasurer's regulations [*not pleaded, nor otherwise appearing in the record, and not mentioned in either of the opinions of the insular Supreme Court*]:

“Its only defect, as we view it, is in failing to give effect to the express language of Section 76(b) which calls not only for the presentation of a claim for refund to the Treasurer but also to the Board of Review and Equalization on appeal.” [*Confer, infra, Point VIII, pp. 42-45*].

suit against the Treasurer under 76(b) to recover *what is justly due it*, the tax having been paid without protest". (*Italics supplied*)

JUDGE BINGHAM also, in referring (R. 32-33) to the Treasurer's regulations, apparently infers that such regulations might be relied upon to sustain the jurisdiction of the court in this case.

JUDGE WILSON (R. 34-40) concurs "in the result of the opinion of JUDGE BINGHAM", but "on the grounds set forth below", in his own opinion.

He holds (R. 37-38, 39) that in case a question is raised as to supposed voluntary overpayment, and the Treasurer refuses to grant a refund in accordance with the plaintiff's claim, then

"the taxpayer under Section 76(b) may appeal to the Board of Review and Equalization" (R. 37-38), . . . the decision of which is final, which was done in this case" (R. 39);¹⁰

and that (R. 39):

"Section 76(b) *clearly implies* that a suit may be brought to recover any sum found to be due by the

¹⁰ Although the only sections of the Act authorizing appeals to the Board of Review and Equalization appear to be sections 57 and 62(b) [and, for a reconsideration, section 76(a)], which relate solely to appeals from the determination of the Treasurer in relation to **deficiency** taxes. There appears to be no provision in the statute providing [expressly, at least] for appeals to the Board in relation to claims for refunds of voluntary payments. [*Confer, infra*, pp. 24-25].

The language of section 76(b) does not appear, on its face, to grant any independent right of appeal to the Board, other than that already provided "according to the provisions of law in that regard". [*Appendix, infra*, p. 60].

Board of Review as an overpayment."¹¹ (*Italics supplied*)

He says further (R. 37):

"that, while ordinarily this Court will follow the interpretation of the law of Puerto Rico by the Insular Supreme Court, we think we are warranted in determining, without regard to the many conflicting decisions of the Insular Supreme Court, what seems to us to be the intent of the Insular Legislature in the passage of Act 74 of the Laws of 1925 so far as it affects the decision of these cases"¹²

PETITIONER'S CONTENTION

Petitioner, as above indicated, believes that the unanimous decision of the Supreme Court of Puerto Rico, following its own earlier unanimous decisions in earlier cases interpreting this local Territorial statute, in relation to the questions here presented, was clearly right, and that JUDGE MORTON was right in agreeing with it.

That the Legislature, in conferring upon the Treasurer

¹¹ Holding as he does, that the taxpayer has a right of appeal to the Board in such a case of a claim of voluntary overpayment of taxes, and that the decision of the Board is "final", JUDGE WILSON, of course, pays no attention to the fact that the plaintiff's "Amended Complaint" does not contain any allegations upon which an examination can be based as to the correctness, in fact, of the respective differing conclusions of the Board, the Treasurer, and the taxpayer itself in its original return, as to the allowances to be made on its item of "Repairs" for its preceding fiscal year of 1926.

¹² But he has apparently failed to notice that there are no "conflicting decisions" of the insular Supreme Court upon the questions here involved of the supposed right of a taxpayer to appeal to the Board of Review and Equalization from the determination of the Treasurer under sections 54, 55, 64, and 75 of a claim for supposed voluntary overpayment, and of the supposed

the power to "determine the correct amount of the tax" (Sections 54 and 55 of the Act), and authorizing him to credit or refund overpayments (Sections 55, 64, and 75), plainly intended to make his "determination" of "the correct amount of the tax" final.¹³ This the Legislature had the power to do (*Dismuke vs. United States*, 297 U. S. 167, 171-172); since the Legislature of Puerto Rico possesses substantially all of the powers of a State Legislature in that regard (*People of Puerto Rico vs. Shell Co.*, 302 U. S. 253, 260-261); and Puerto Rico is so far sovereign that it may not be sued without its own consent (*People of Puerto Rico vs. Rosaly*, 227 U. S. 270); and, at common law, taxes voluntarily paid cannot ordinarily be recovered at all in the absence of a statute authorizing it (*Little vs. Bowers*, 134 U. S. 547; *Moore Ice Cream Co. vs. Rose*, 289 U. S. 373, 375-376).

That the majority of the Circuit Court of Appeals,

right of the taxpayer to maintain an action in court, such as this, practically in the nature of an appeal to the courts from the Treasurer's determination of such a claim for refund of voluntary supposed overpayments. On those questions *there is no conflict in the decisions of the Supreme Court of Puerto Rico*. That court has uniformly (and unanimously) held, in three decisions, including that in the present case, that the Treasurer's determination of such a claim for a refund is final; that that is a matter entrusted by those sections of the statute to the Treasurer's determination; that he is "to judge the merits of each claim." The insular Supreme Court has never recognized any right of appeal from the Treasurer, from such a determination on a claim for refund of such voluntary payments under this Act of 1925, either to the Board of Review and Equalization, or to the courts. See *infra*, Points VI and VII, pp. 37-42.

¹³ *Except as to "deficiency taxes"*, with relation to which express provisions are made, *expressly providing* for appeals to the Board of Review and Equalization, and for recourse to the courts. Sections 57, 62(b), and 76(a) and (b).

JUDGES BINGHAM and WILSON, erred in reading into the negative prohibitory language of Section 76(b) of the Act affirmative grants of power (a) to the Board of Review and Equalization to entertain appeals and to bind the Treasurer in other cases than those relating to deficiency taxes, and (b) to the courts to entertain actions in the nature of appeals from the Treasurer's "determination" "of the correct amount of the tax" in other cases than those relating to deficiency taxes.

That the majority Judges also erred in disregarding the settled rule as to the respect to be paid to the decisions of the local Territorial Supreme Court interpreting a local Territorial statute; and erred in overlooking and disregarding the absence of any allegations in the "Amended Complaint" tending to impeach the Treasurer's decision on the merits in any way, or tending in any way to show that, as to the allowances to be made on the item of the plaintiff sugar company's "Repairs" for its fiscal year 1926,—upon which the calculations of the Board of Review, and of the Treasurer, and of the company itself in its initial tax return, differed among themselves,—there was any reason for giving any more weight to the Board's opinion than to that of the Treasurer,—(unless the Treasurer is to be considered as bound by the decision of the Board upon an appeal other than in relation to "deficiency taxes").

And that in each of the separate opinions of the two majority Judges, there is further error in that both of those two opinions overlook and are in conflict with the applicable decisions of this court, particularly *Dismuke vs. United States*, *supra*, 297 U. S. 167, 171-172; *Little vs. Bowers*, 134 U. S. 547; *Moore Ice Cream Co., vs. Rose*, 289 U. S. 373, 375-376; and, in connection therewith, the decisions of this court in *People of Puerto Rico vs. Shell Co.*, 302 U. S. 253, 260-261, and *People of Puerto Rico vs. Rosaly*, 227 U. S. 270.

OPINIONS BELOW

The opinions of the insular District Court ("Order, R. 9-10), and "Judgment" overruling plaintiff's motion for reconsideration (R. 16-17), are not officially reported. The opinions of the insular Supreme Court on the first hearing (R. 18) and upon reconsideration (R. 23-24) are officially reported, respectively, in 50 P. R. Dec. 962 (*Spanish Edition*), and 51 P. R. Dec. 135 (*Spanish edition; Advance Sheets*). They have not yet appeared in the English edition of the Puerto Rico Reports. The three separate opinions of the judges of the Circuit Court of Appeals are reported in 98 F. (2d) 398-404.

JURISDICTION

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered July 13, 1938 (R. 29). The time within which to apply for a writ of certiorari to this court was extended fifty days by order of MR. JUSTICE BRANDEIS, until December 2, 1938 (R. 44).

The petition for certiorari, together with the supporting brief for petitioner, and the transcript of the record, was filed in this court on December 2, 1938, within the time thus limited. Certiorari was granted on January 30, 1939 (R. 45).

SPECIFICATIONS OF ERRORS TO BE URGED

These are indicated under the headings "Questions Presented" and "Petitioner's Contention" (*ante*, pp. 2-3 and 18-20).

SUMMARY OF ARGUMENT

This appears under the heading "Petitioner's Contention" (*ante*, pp. 18-20).

ARGUMENT

Point I

The Legislature of Puerto Rico was under no obligation to provide taxpayers any recourse to the courts from the insular Treasurer's "determination" of the "correct amount of the tax", upon taxpayers' petitions for refunds of supposed overpayments made voluntarily and without protest.

The Legislature may properly make the Treasurer's determination final in such cases.

A. This is the rule with relation to the federal government. This court said in *Dismuke vs. United States*, *supra*, 297 U. S. 167, 171-172;

"The United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise. See *United States vs. Babcock*, 250 U. S. 328. * * * If the statutory benefit is to be allowed only in his" [the administrative officer's] "discretion, the court will not substitute their discretion for his."

B. The same rule is applicable with relation to the government of Puerto Rico, which is so far sovereign that it may not be sued, except with its own consent. *People of Puerto Rico vs. Rosaly*, 227 U. S. 270. The Legislature of Puerto Rico possesses substantially the same powers in this respect as the legislature of a State. *People of Puerto Rico vs. Shell Co.*, 302 U. S. 253, 260-261; and,

"The grant of legislative power in respect of local matters contained in section 32 of the Foraker Act¹⁴ and continued in force by section 37 of the Organic Act of 1917¹⁵ is as broad and comprehensive as lan-

¹⁴ Act of Congress of April 12, 1900, c. 191, 31 Stat. 77.

¹⁵ Act of Congress of March 2, 1917, c. 145. 39 Stat. 951, 964.

guage could make it." (*People of Puerto Rico vs. Shell Co.*, *supra*, at p. 261).

C. At common law, in the absence of statutory permission, there is no recourse to the courts for the recovery of taxes paid voluntarily and without protest. *Moore Ice Cream Co. vs. Rose*, 289 U. S. 374, 375-376; *United States vs. N. Y. & Cuba Mail S. S. Co.*, 200 U. S. 488; *Chesebrough vs. United States*, 192 U. S. 253; *Little vs. Bowers*, 134 U. S. 547; *Curtis' Adm'x. vs. Fiedler*, 2 Black 461; *Elliott vs. Swartwout*, 10 Pet. 137, 153.

Point II

The negative prohibitory language of section 76(b) of the Puerto Rican Income Tax Act of 1925 does not evidence any intent on the part of the Legislature thereby to make any affirmative grants of power either (a) to the Board of Review and Equalization to entertain any appeals or to bind the Treasurer by its decisions in any cases other than those relating to deficiency taxes assessed by the Treasurer, or (b) to the taxpayers of any recourse to the courts, or to the courts of any jurisdiction to entertain taxpayers' suits to review the Treasurer's determinations of the correct amount of the tax, in any cases other than those relating to "deficiency taxes".

A. The wording of section 76(b) of the Act of 1925 is exclusively negative and prohibitory, on its face.

B. It is a sub-paragraph (the second paragraph) of section 76; and the heading for the entire section, as enacted by the Legislature as a part of the law, is "LIMITATIONS upon Suits and Proceedings by the Taxpayer". There is here no indication of any intention on the Legislature's part to include in this section any affirmative grant of additional rights or powers either to the taxpayer, to the Board of Review, or to the courts.

C. A "negative pregnant" cannot ordinarily amount to an affirmative grant of powers. The effect of the negative pregnant is simply,—(as, ordinarily, the question

arises, in pleadings in actions at law),—to admit the existence or application of the ordinary general rule, except in so far as it is specifically denied by the language of the negative pregnant. It goes no further. It does not affirmatively create a new rule of the contrary tenor.

D. As applied to the present case, if there had been in effect a general rule, either pre-existing or created by some other general legislation, or created by other provisions of this Act allowing recourse to the courts or allowing appeals to the Board of Review and Equalization from tax determinations of the Treasurer generally,—or in cases other than those relating to deficiency taxes,—then the effect of the negative pregnant language in section 76(b) would have been to confine its limitations to the specific cases there mentioned and to leave the pre-existing (or otherwise existing) right of recourse to the courts, or of appeal to the Board, unaffected and still in existence. *But that is not the situation here.* Independently of this section 76(b) there is, clearly, no recourse to the courts and no appeal to the Board from the Treasurer's determinations of the correct amount of the tax, except in relation to deficiency taxes. There is, therefore, no general right of such recourse or appeal that could be left unaffected by the negative pregnant language of this statute. To the contrary, the general rule that is left so unaffected is the general rule that there is no such recourse to the courts and no appeal to the Board (except with relation to deficiency taxes), because none existed at common law, and none is otherwise granted by the statute.

Hence JUDGE MORTON was right in saying of this Section 76(b) in his dissenting opinion in this case (R. 41):

“At first reading it appears to be a limitation or restriction on suits for recovery of overpayments, already authorized elsewhere in the statute. It says in effect that no suit shall be maintained in any

court until a claim for refund shall have been filed with the Treasurer and on appeal with the Board of Review *'according to the provisions of law in that regard and the regulations established in pursuance thereof.'* The difficulty is that there are no provisions of law authorizing suits in court for the recovery of taxes voluntarily paid or empowering the Board of Review to deal with claims for refund on appeal from the Treasurer, or with taxes which *have been paid.*" (*Italics are JUDGE MORTON'S.*)

E. It appears that, elsewhere in this Act, *the Legislature of Puerto Rico, when it desired to confer affirmative powers or rights upon the Board of Review and Equalization, or upon the courts, or the taxpayer, regularly employed direct positive affirmative language to that end, and did not leave its intent to be gathered from doubtful implication from negative pregnant phraseology.* Thus, in sections 57(a) and 62(b) [Appendix, *infra*, pp. 54,55], relating to deficiency taxes, the right of appeal to the Board of Review and Equalization is specifically given to the taxpayer by direct affirmative language; and, likewise, with relation to deficiency taxes, the right of appeal to the courts is specifically given to the taxpayer in direct affirmative unmistakable language by Section 76(a); Appendix, *infra*, p. 59. [It is agreed on all hands that Section 76(a) relates only to deficiency taxes: JUDGE BINGHAM, R. 31; JUDGE WILSON, R. 37; JUDGE MORTON, R. 41].

Point III

The limitations placed by the Income Tax Act of 1923 upon the jurisdiction of the Board of Review and Equalization with relation to income taxes are not enlarged or affected in any way by the earlier Act of August 2, 1923, amending sections 308, 310, and 313 of the Political Code with relation to the general powers of the Board.

With relation to income taxes, the later income Tax Act is a complete code in itself.

A. Sections 308, 310, and 313 of the Political Code, as amended by Act No. 75 of August 2, 1923 (Laws of 1923, pp. 604-608), are in the Appendix (*infra*, pp. 66-68). Respondent, in its "Brief in Opposition" heretofore filed herein, in opposition to our original petition for certiorari, contended (pp. 10-13) that those sections carry over, and operate to enlarge the powers, with relation to income taxes, given to the Board by the later Income Tax Act of 1925 here before us.

B. But that Act of 1923 *was enacted while the Income Tax Act of 1921 was in effect* (Act No. 43 of July 1, 1921, Laws of 1921, pp. 312-356).

C. Under the 1921 Act, *the taxpayer was not expected to pay his tax upon filing his income tax return*. On the contrary, that Act contemplated that, *in all cases*, the amount of the tax to be paid should be calculated and assessed by the Treasurer, some time after the taxpayer had made his return; and that the taxpayer was not expected to pay the tax until after it had thus been *assessed* by the Treasurer and notice of the amount thus assessed had been given to the taxpayer (Act of 1921, Secs. 19-26, 32, 38, 40, 41; Laws of 1921, pp. 334-346). So that, *in all cases*, there was an *assessment* by the Treasurer, and if the taxpayer objected to the assessment an appeal was provided for him to the Board of Review and Equalization (Act of 1921, Secs. 45-47; Laws of 1921, p. 348).

D. *It was in order to make the corresponding sections of the Political Code correspond to that scheme of assessment of the 1921 Income Tax Act*, in so far as the Board's duties related to income taxes, that the Legislature enacted the Act No. 75 of August 2, 1923, amending sections 308, 310, and 313 of the Political Code.

E. But that scheme for the payment of income taxes was revolutionized by the Income Tax Act of 1925, here involved.

Instead of the taxpayer being expected to wait before payment of the taxes until after his tax return had been examined by the Treasurer and the amount of the tax calculated and assessed and notification of the amount given to the taxpayer with a request for payment, this new Act of 1925 requires the taxpayer to make payment immediately, coincidentally with filing his tax return, of the amount calculated by himself; and contemplates that he will not receive any notice from the Treasurer at all, *unless* the Treasurer afterwards finds that the taxpayer has not paid as much as the "correct amount of the tax", as determined by the Treasurer on subsequent examination of the tax return; and that, in such cases of underpayment (or of failure to pay) the Treasurer shall assess a "*deficiency tax*" and notify the taxpayer of the amount of such "*deficiency tax*"; and then that the only office of the Board of Review and Equalization is to consider appeals from any such "*deficiency tax*" thus assessed by the Treasurer, to which a taxpayer may object.

That is an entirely new scheme, with which the former provisions for appeals to the Board, as contained in the 1921 Income Tax Act and in the 1923 amendments to the Political Code,—which, as above pointed out, were enacted in order to conform with the 1921 Act,—just do not fit at all.

F. The 1925 Act was not an amendment of the former 1921 Act; but was a complete new income tax code.

The 1925 Act is entitled:

"An Act to provide revenues for the People of Puerto Rico through the levying of certain income taxes, and for other purposes" (Laws of 1925, page 400).

MICROCARD

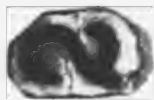
TRADE MARK 

22



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393



3772

3

8

-6

9



and its first section provides:

"Section 1.—This Act shall be known as the 'Income Tax Act of 1924' " (Laws of 1925, page 400.)"

Furthermore, its Section 85 expressly provides (Laws of 1925, page 548):

"Section 85.—(a) Income Tax Law No. 43, approved July 1, 1921, as amended, is repealed as of January 1, 1924."

G. This new complete code, carrying this express repeal of the entire prior income tax system, necessarily superseded all contradictory provisions relating to the powers of the Board of Review and Equalization contained in the prior laws, whether in the 1921 Income Tax Act itself, or in the 1923 amendments of the Political Code which had been made in order to conform to the 1921 Act.¹⁷ [Or, perhaps, it might be more accurate to say, with relation to those sections of the Political Code, that, necessarily, they are impliedly amended by the later 1925 Act, so that the powers and jurisdiction of the Board, on appeals in income tax cases, are thereafter to be such,—(and such only),—as are provided in the 1925 Act.]

H. It follows that, since the enactment of the 1925 Act, which is the *later expression of the legislative will*, the powers and jurisdiction of the Board, with relation

¹⁶ Although not enacted until August 6, 1925. See *ante*, footnote 3, p. 10.

¹⁷ And so, *vice versa*, it has finally been held that the still later amendment of the *general tax laws* by the Act of 1927 concerning the time within which to begin suits for tax refunds, does not affect this Income Tax Act of 1925; because *this income tax act is a complete code in itself*, covering the law with relation to income taxes. (Confer, last paragraph of JUDGE WILSON's opinion in the Circuit Court of Appeals; R. 40).

income taxes, are those granted it by that 1925 Act; and, in relation to income tax cases, *are only those*; and are none others.

I. Whence it results that, as hereinbefore stated (Point I, *ante*, pp. 23-25), the jurisdiction of the Board of Review and Equalization in income tax cases is now limited to appeals relating to "deficiency taxes".

Point IV

It is particularly significant of the intent of the Legislature of Puerto Rico not to permit any recourse to the courts from the Treasurer's determination of the correct amount of the tax (or any appeal to the Board of Review and Equalization), except in relation to deficiency taxes, that, in drafting sections 75 and 76(b) of the Act of 1925, it entirely omitted provisions appearing in cognate sections of the earlier Puerto Rican Act of 1919, and of the federal Revenue Act of 1924, respectively, upon which these Sections 75 and 76(b) are otherwise closely modeled, and which would have permitted recourse to the courts from all tax determinations of the Treasurer, had the Legislature been fit to follow them in drafting this Act of 1925.

A. Section 75 of the Act of 1925 (Appendix, *infra*, p. 59) is quite closely modeled upon Section 66 of the earlier Act of 1919 (Act No. 80, Laws of Puerto Rico, 1919, pp. 612, 666; Appendix, *infra*, pp. 60-61), which had been repealed by the Act of 1921, repealing the entire 1919 Act. (Act No. 43, Section 63; Laws of 1921, pp. 312, 356; Appendix, *infra*, p. 61).

(1) *But the second paragraph of that Section 66 of the 1919 Act had gone on to provide,—in addition to its first paragraph which is substantially followed in Section 75 of the 1925 Act,—the following, in its second paragraph, expressly granting recourse to the courts from all tax determinations of the Treasurer under that 1919 Act:*

"That when proper claim has been made to the Treasurer of Puerto Rico for the return, reimbursement or remittal of any duties or taxes erroneously levied or collected, * * * if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice";

and, under that provision in the second paragraph of that section of the 1919 Act, the Supreme Court of Puerto Rico had held that, *because of that express legislative direction*, a taxpayer, even though he had paid voluntarily and without protest, might make his claim for refund to the Treasurer and if the Treasurer denied it "without reason" he might have his action in court against the Treasurer for the refund. *Serrallés vs. Treasurer*, 30 P. R. Rep. 220, 223-224; *McCormick vs. Treasurer*, 44 P. R. Dec. (*Spanish ed.*) 432, 438-440.

(2) But, as the Supreme Court of Puerto Rico pointed out in its opinion in *Compañía Agrícola de Cayey vs. Domenech, Treasurer, supra*, 47 P. R. Dec. 535, 539, quoted and followed in its opinion of July 23, 1936, in the *Fertilizer* case (Appendix III, *infra*, pp. 65-66), the entire Income Tax Act of 1919 was repealed by the repealing clause, section 63, *supra*, of the Income Tax Law of 1921 (Act No. 43, Laws of 1921, pp. 312, 356; Appendix, *infra*, p. 61), which repealed the entire 1919 Income Tax Law, substituting the 1921 Act as a complete new code in lieu thereof, and saving only the provisions of the earlier act "in force as regards the levying and collection of all taxes accrued thereunder, and for the levying and collection of all fines imposed or that may be imposed in connection with said taxes."

(3) *The 1921 Act contained no provision whatever corresponding to section 66 of the 1919 Act, and no provision of any kind for the refund of income tax payments made voluntarily and without protest. The result*

was that, as the Supreme Court of Puerto Rico said in the *Compañía Agrícola de Cayey* case quoted in the July 23, 1936, opinion in the *Fertilizer* case (Appendix III, *infra*, pp. 65-66) :

“It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by means of lawsuit also disappeared. From 1921 on the payment under protest was an express condition preliminary to the initiation of a lawsuit. Though the law of 1921, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the refund of the taxes could be obtained. And such was the general understanding.

(4) Then, four years later, the Income Tax Law of 1921 was repealed, in its turn, and this Act of 1925 was substituted for it. And this Act, by its Section 75 here involved, again provided,—but in different form,—a power in the Treasurer to refund to a taxpayer income tax payments mistakenly or unwittingly made voluntarily and without protest. But, as was pointed out by the insular Supreme Court in the *Compañía Agrícola de Cayey* case, and in its opinion of July 23, 1936, in the *Fertilizer* case (Appendix III, *infra*, pp. 62-66), following and quoting the *Agrícola de Cayey* case, and followed in the present case (R. 18, 23-24), the Legislature in restoring to the taxpayer, by Section 75 of the present code, the privilege of requesting the Treasurer to refund voluntary tax payments unwittingly made, *did not see fit to restore* the right formerly given to the taxpayer by the last paragraph of section 66 of the 1919 Act, as above quoted (*ante*, p. 30; Appendix *infra*, pp. 60-61), to resort to the courts in case the Treasurer

denied his claim "without reason". *That provision of the 1919 Act was not reenacted.* To the contrary, the Legislature in the present code enacted simply (Laws of 1925, at pp. 356-538; Appendix *infra*, p. 59).

"Section 75. The Treasurer is *authorized* to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; *and shall make report to the Legislature of Puerto Rico* at the beginning of each regular session of all transactions under this section" (*Italics supplied*);

and stopped there.

(5) *And then, as if to emphasize its intention not to permit action in the courts to review what the Treasurer has "determined" to be "the correct amount of the tax" (Sections 54, 55), nor to review any refusal of the Treasurer to change his "determination", nor his refusal to allow any further refund in favor of a taxpayer upon any request under section 75,—and to drive home the legislative purpose that there should be no resort whatever to the courts for any refund of income taxes or excess-profits taxes, (EXCEPT "deficiency taxes"), in accordance with the provisions of the mandatory system established by sections 54, 55, 64 and 75 of the Act,—the Legislature, by section 76(b) of the Act (Laws of 1925, at pp. 538-540; Appendix *infra*, p. 60) expressly provided:*

"(b) *No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or any pecuniary penalty . . . until a claim for refund or credit has been duly filed with the Treasurer and with the*

Board of Review and Equalization on appeal, *according to the provisions of law in that regard*¹⁸, and the regulations established in pursuance thereof". (*Italics supplied*)

In other words, that there should be no suit at law or other proceeding in court for the recovery of voluntary payments, nor in the nature of appeal from the Treasurer's action in denying any request made to him under Section 75 of the Act.

(6) *And the legislative intention is further driven home and emphasized* by the significant fact that the Legislature, in framing section 76(b) of this statute, followed, almost word for word, the phraseology of Section 3226 of the United States Revised Statutes as amended by Section 1014(a) of the federal "Revenue Act of 1924", the Act of Congress of June 2, 1924, c. 234, 43 Stat. 253, 343, *until the Legislature came down to the words "according to the provisions of law in that regard"*, in the federal Act (7th and 8th lines of sec. 3226, U. S. Rev. Stats., as amended by sec. 1014(a) of the Federal Revenue Act of 1924; 9th and 10th lines, as copied in Appendix II, *infra*, p. 61; first line at the top of the page in the Puerto Rican Act, in the Laws of Puerto Rico, 1925, p. 540); *but then stopped there*. Instead of copying the immediately following provision of the federal statute allowing suits in court for refund of voluntary payments even though made without protest, the Legislature of Puerto Rico *deliberately omitted that provision of the federal statute, and did not copy it nor put in any corresponding language at all*. The federal statute (Rev. Stats., Sec. 3226, as amended by section 1014(a) of the Federal Revenue Act of 1924; 43 Stat. 343; Appendix II, *infra*, p. 61),—immediately following

¹⁸ *Id est*, otherwise provided.

the word "regard",—goes on, "and the regulations of the Secretary of the Treasury established in pursuance thereof"; and then comes, in the federal statute, the clause which we have printed in **bold type** in Appendix II, hereto, *infra*, p. 61:

"but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress."

The omission of that language by the Legislature of Puerto Rico in drafting Section 76(b) of the Puerto Rican Act here in question was certainly not an oversight. It was plainly deliberate; plainly intended to drive home the intention of the Legislature of Puerto Rico not to follow the Congress in regard to the recovery of voluntary income tax payments not made under protest; and to drive home and emphasize the Legislature's intention, in restoring, by Section 75 of the present Act, a privilege analogous to that formerly given Puerto Rican taxpayers by Section 66 of the old 1919 Act, not to revive the right of access to the courts formerly given by the second paragraph of Section 66 of the 1919 Act in case of the Treasurer's denial of a taxpayer's request "without reason". That second paragraph of Section 66 of the 1919 Act was entirely omitted in framing Section 75 of the present code,—an omission which, again, was clearly deliberate, and was not an oversight.

(7) It results that, in view (1) of this deliberate action of the Legislature of Puerto Rico in omitting these clauses, both from Section 75 and from Section 76(b), in framing the present income tax code, and in view (2) of the established rule recently reiterated by this court in the *Moore Ice Cream Company* case that (*Moore Ice Cream Co. vs. Rose, supra*, 289 U. S. 373, 375-376):

"1. At common law . . . protest at the time of

payment was a condition precedent to the recovery of a tax. . . . The rule still persisted until 1924, when it was abolished by the Revenue Act of that year, with a *proviso* that pending suits should be unaffected by the change",

the common law rule is the rule still applicable in Puerto Rico, where no statutory change has been made by the Legislature, such as the Congress made in the federal statute by Section 1014 of the Federal Revenue Law of 1924. The rule is correctly applied by the insular Supreme Court in its decision in the present case, and in its earlier decisions which it followed here.

Point V

The opinions of the majority members of the Circuit Court of Appeals, Judges Bingham and Wilson, erred in failing to apply here the established rule that the decision of a Territorial Supreme Court, such as the Supreme Court of Puerto Rico, construing a local statute of the Territory, will be followed unless "clearly erroneous"; and further erred in failing to recognize that the decision of the Supreme Court of Puerto Rico in this case was, in any event, not "clearly erroneous", and, therefore, should have been followed, under this rule.

A. The decision of the insular Court in this case following the rule already established by it in the preceding cases of *Compañía Agrícola de Cayey Ltd.*, vs. *Domenech, Treasurer*, *supra*, 47 P. R. Dec. 535, and *Porto Rico Fertilizer Co.* vs. *Domenech, Treasurer*, 50 P. R. Dec. 405, decided July 23, 1936 (Appendix III, *infra*, pp. 62-66), falls within the established rule that the decision of a Territorial Supreme Court, such as the Supreme Court of Puerto Rico, construing a local statute of the Territory, will be followed, unless "clearly erroneous". This decision of the insular Court is certainly not "clearly erroneous"; but on the contrary is right and reasonable; and therefore under the established rule will not be disturbed. *Domenech vs. Verges*,

69 F. (2d) 714; *De Villaneuva vs. Villaneuva*, 239 U. S. 293, 289-299; *Cardona vs. Quinones*, 240 U. S. 83, 88; *Loiza Sugar Co. vs. People of Puerto Rico*, 57 F. (2d) 705, 706; *Porto Rico Coal Co. vs. Domenech*, 41 F. (2d) 183, 185; *Richardson vs. Fajardo Sugar Co.*, 237 Fed. 195, 196; *Russell & Co. vs. Sancho Bonet, Treasurer*, 92 F. (2d) 821.

B. On this point JUDGE MORTON was clearly correct in saying in his dissenting opinion in this case (R. 42), in relation to the holding of the Supreme Court of Puerto Rico:

"The Supreme Court accordingly held that with respect to voluntary overpayments the taxpayer was in the hands of the Treasurer on matters of refund, 'if the decision of the Treasurer is against him he cannot appeal from the same to courts of justice.' This does not seem to me an unreasonable solution of the difficulty which confronted them. Indeed I incline to think it was right. Under the view, taken in the majority opinions, every tax which has been voluntarily paid without protest may be reopened on claims for refund at any time within four years and resettled *de novo* in court proceedings. This is in fact what is approved by the decision in the *Yabucoa Sugar* case before us. Greater consideration is shown to voluntary overpayments than to deficiency assessments. This certainly is a wide departure from the view of the Supreme Court of Puerto Rico. It has often been said that in matters of local law the opinion of that court is not to be set aside unless clearly wrong. As I have said I incline to think the Supreme Court of Puerto Rico was right; I certainly do not think it was clearly wrong."¹⁹

¹⁹ JUDGE WILSON (R. 37) declines to follow the insular Court's interpretation of this local statute because of "conflicting decisions" of that court. But, as hereinbefore (*ante*, footnote 12, p. 18) and hereinafter (*infra*, Points VI and VII, pp. 37-42) pointed out, there are no

Point VI

The decision of the insular Supreme Court was clearly right.

A. In relation to voluntary income tax payments made by a taxpayer upon filing his own income tax return under the 1925 Act, the "mandatory duties" of the Treasurer are simply: (1) To examine the return and to "determine the correct amount of the tax" (Sec. 54); and (2) If the Treasurer finds that the taxpayer has overpaid the amount which the Treasurer has thus "determined to be the correct amount" of the tax (or of an installment) then to credit or refund the amount of such overpayment *as thus determined by the Treasurer* (Secs. 55, 64).

B. In addition, if the taxpayer, at any time within four years [Sec. 64(b)], claims that he has mistakenly, —although voluntarily and without any protest,—made any overpayment, then the Treasurer is "authorized" to refund any amount which he may find to have been "erroneously or illegally assessed or collected" or to have been "unjustly assessed or excessive in amount, or in any manner wrongfully collected", and to "make report to the Legislature of Puerto Rico" of such refund (Sec. 75).

C. Of course that provision of Section 75 of the Act, that the Treasurer is "authorized" to make such refunds, means that a mandatory duty is imposed upon

such conflicting decisions, as to the questions here involved.

There was a conflict of decision on another point, viz., whether Act No. 8 of 1927 changed in any way the provisions of the Act of 1925 here involved. But, as JUDGE WILSON himself notes (R. 40) that question has now been "finally concluded" in the negative. It is not here. (There was also another question, not here involved, as to whether, with relation to "deficiency taxes", a second appeal to the board was necessary after the treasurer's final decision.)

him to hear and determine and to judge any such claims that may be presented to him; but that is the extent of his mandatory duty under that Section 75, viz., to hear and to determine and to judge.

If he performs that duty, if he accords the claimant a full and fair hearing, and regularly determines and judges the claim, then that is the end of it. The Legislature has provided no appeal from the Treasurer's decision on such a claim. The Treasurer, under Section 75 in connection with Sections 54 and 55, determines the "correct amount of the tax", and makes such refund, if any, as, upon such hearing under Section 75, he finds to be correct.²⁰

D. As the insular Supreme Court phrased it, in its opinion on rehearing in the *Fertilizer Company* case, July 23, 1936, in considering the powers and duties of the Treasurer under this Section 75 of the Act of 1925 (50 P. R. Dec. 405, 410-411, *Spanish Edition*; translation in Appendix III, *infra*, p. 62:

"The authorization cannot, in fact, be more ample. The Treasurer acts by himself. *He is called upon to judge the merits of each claim.* By said Section 75 he is only charged with the duty of rendering a report to the Legislature of Puerto Rico, at the inception of each regular session, of all the transactions carried to effect by him in the exercise of said authorization." (*Italics supplied*)

²⁰ Doubtless, if the Treasurer refused a proper hearing under Section 75, or proceeded in an irregular manner, or refused refund of an amount which he had himself determined had been excessively collected above the "correct amount of the tax" determined by him under Section 54, then *mandamus* would lie to compel him to do his duty. But there is no suggestion in this record of any such abuse of the Treasurer's powers in the present case.

E. To "judge". That is the apt word to describe the Treasurer's powers under Section 75. He exercises *quasi-judicial power to hear and to determine*. That is the furthest removed from,—is, indeed, the exact antithesis to,—any uncontrolled or irresponsible or arbitrary power,—or to the indulgence of any "whim" of the Treasurer (JUDGE BINGHAM, R. 33).

Nothing is left to the Treasurer's "whim" or to any uncontrolled "discretionary" power; but, as the insular Supreme Court holds, the *quasi-judicial* duty is imposed on the Treasurer to **judge** the merits of each claim. He is bound by the rules of fair play applicable to all hearings and decisions by administrative tribunals, as well as to the superior courts; but the Legislature had the undoubted power to provide, as it did by the Act of 1925, that, after this full hearing has been awarded, and after the Treasurer has performed his duty "to judge the merits of the claim", and has thus judged and decided it, then the taxpayer has no appeal to the courts from the Treasurer's decision. It is final.²¹ [In the absence, of course, of any claim of irregularity in procedure, or of any abuse of that kind of the Treasurer's power. No such claim of irregularity is made in this record].

Point VII

The supposed confusion or contradiction, to which Judge Wilson adverts (R. 37), in decisions of the insular Supreme Court, does not exist with reference to the finality of the decision of the Treasurer upon a claim for refund of voluntary supposed overpayments. The decisions of the insular Supreme Court, on this question, are all in harmony with each other, and are clear and correct.

A.—By section 66 of the Puerto Rican Income Tax Act of 1919, the Treasurer was given authority to consider claims for, and to "remit, reimburse or make resti-

²¹ Point I, *ante*, pp. 22-23.

tution for" income taxes erroneously or unlawfully imposed or collected; but his decision was not made final. To the contrary, as above pointed out (*ante*, Point IV, pp. 30 *et seq.*), it was expressly provided that if the Treasurer "refuses without reason to grant such a claim", then "the aggrieved party may appeal to the courts of justice" (Act No. 80, Laws of Puerto Rico, 1919, p. 666; Appendix I, *infra*, pp. 60-61.

B.—In cases arising under that Act of 1919, the Supreme Court of Puerto Rico held that, *in view of that express provision of the Statute* allowing "the aggrieved party" an "appeal to the courts of justice", such an "appeal", in the form of an action in the appropriate insular district court for a tax refund, would lie at the suit of "the aggrieved party", the taxpayer, even though the original tax payment had been made voluntarily and without protest. *Serrallés vs. Treasurer*, *supra*, 30 P. R. Rep. 220, 223-224; *McCormick vs. Treasurer*, *supra*, 44 P. R. Dec. (*Spanish ed.*) 432, 438-440.

C.—By the Income Tax Law of 1921 (Act No. 43, Laws of Puerto Rico, 1921, pp. 312, 356; Appendix, *infra*, p. 61) the entire Act of 1919 was repealed by the repealing clause, Section 63 of the Act of 1921. The 1921 Act was substituted as a complete new code. This 1921 Act contained no provision corresponding to Section 66 of the former 1919 Act, and no provision of any kind for refunds of income tax payments paid voluntarily and without protest.

D.—In view of that repeal by the 1921 Act of the former provision of Section 66 of the 1919 Act, the Supreme Court of Puerto Rico held in the *Compañía Agrícola de Cayey* case, followed by that court in the present case, that (*as quoted ante*, p. 31) there no longer remained, from 1921 to 1925 [that is to say from the date of the enactment of the 1921 Act up until the enactment

of the 1925 Act], any authority anywhere in the Puerto Rican governmental establishment, either in the Treasurer or in anybody else, to make refunds of voluntary income tax payments paid without protest.

E.—By section 75 of the Income Tax Act of 1925, authority was again given to the Treasurer to consider such claims, and to make such refunds, and to report his actions to the Legislature. But this authority was given in somewhat different form from that given by Section 66 of the former 1919 Act, and the provision contained in Section 66 of the 1919 Act permitting the taxpayers recourse to the courts from the Treasurer's decisions on claims for such refunds, *was entirely omitted* from Section 75 of the 1925 act. And, as above pointed out (*ante*, pp. 31-35) *that omission was manifestly deliberate and purposeful on the Legislature's part.*

F.—Under those circumstances, and in view of that legislative history, and of the deliberate omission by the Legislature from Section 75 of the 1925 Act of the provision which it had put into the corresponding Section 66 of the earlier 1919 Act, the Supreme Court of Puerto Rico following its decision in the *Compañía Agrícola de Cayey* case *supra* (*Compañía Agrícola de Cayey vs. Treasurer*, 47 P. R. Dec. [*Spanish ed.*] 535, 538-540), held on rehearing, July 23, 1936, in the *Porto Rico Fertilizer Company* case, *supra* (50 P. R. Dec., *Spanish ed.*, 405, 410-414; translation in Appendix III, *infra*, pp. 62-66),—and followed and adhered to it in the present case,—that as above quoted (*ante*, p. 15),

“As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of justice without paying under protest.” He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said

tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice."

G. As we have said, the decisions of the Supreme Court of Puerto Rico upon this point are plain and free from confusion.

They are in harmony with each other. They clearly trace the development of the legislation. They are reasonable. They are all unanimous. The power which they hold that the Legislature exercised, to make the determinations of the Treasurer final under Section 75 of the 1925 Act, is clearly a power within the legislative authority vested in the Legislature of Puerto Rico by the Organic Act of the Congress, by which that Legislature has been invested in such matters with powers "nearly, if not quite, as extensive as those exercised by the State legislatures". *Puerto Rico vs. Shell Co.*, *supra*, 302 U. S. 253, 262 [And *confer ante*, Point I, pp. 22-23].

H. Under these circumstances, there should be accorded to these unanimous and harmonious decisions of the Supreme Court of Puerto Rico the respect regularly accorded by the established rule to decisions of a Territorial Supreme Court interpreting local Territorial statutes.

Point VIII

The Treasurer's Regulations have nothing to do with this case.

Respondent, in the latter part of its Point "Second" of its "Brief in Opposition" heretofore filed in this case, quoted (at pp. 19-21), regulations promulgated by the insular Treasurer (a predecessor of the present Treasurer), on May 17, 1926, and claimed that they have a controlling effect here. Those are the same regulations to which reference was made by JUDGE BINGHAM in his opinion in the Circuit Court of Appeals (R. 32-33), as

above noted (*ante*, p. 16; footnote 9), and to which neither of the other Judges of the Circuit Court of Appeals, nor the insular Supreme Court, paid any attention.

A. Aside from the fact that this is not a case of supporting any long-established administrative practice embodied in a rule of any administrative officer, or acted upon and enforced by the administrative officer in question and by the local courts,—*but the exact contrary*, because, here, *the Treasurer did not consider these regulations applicable, and did not apply them*, and the local courts likewise disregarded them and supported the action of the Treasurer here,—*these regulations*, on their face, *do not apply to this case*.

B. Respondent's counsel quoted and relied on Article 355 of the Regulations of May 17, 1926. On its face, its applicability hinges upon the first seventeen words of its sub-paragraph "(1)", which read, as Respondent quoted them:

"(1) When the taxpayer receives notice from the Treasurer that the income tax has been determined, he may: ***".

Then follow the several things that the taxpayer may do. But it all hinges on the taxpayer having thus received "*notice from the Treasurer that the income tax has been determined*". [Sub-paragraph ("2") follows along, after that original "notice" contemplated by sub-paragraph "(1)"].

C. Plainly, on its face, the language of that Regulation is a "hangover" from the language of some prior regulations that had been promulgated under the prior Income Tax Law of 1921, and were suitable to that law, under which, as hereinbefore pointed out (*ante*, pp. 26-27), the taxpayer was not required nor expected to make any payment at the time he filed

his income tax return, but only after having, later on, received notice from the Treasurer that, as this Regulation phrases it, "the income tax has been determined".

The draftsman of this Regulation, issued the following Spring after the enactment of the new 1925 Income Tax Act, had apparently not completely grasped the revolutionary character of the change in the system of payment of income taxes contemplated by the new 1925 Act [*confer, ante*, pp. 27-29], and failed fully to adapt the language of the Regulation to the new system contemplated by the 1925 Act. But, in any event, taking the language of the Regulation just as it stands, and attempting to fit it in to the provisions of the 1925 Act, this language of the Regulation can, on its face, properly apply only to cases of "deficiency taxes".

D. Under the 1925 Act, it is only in the case of assessment of "deficiency taxes" that the taxpayer "receives notice from the Treasurer that the income tax has been determined", within the language of this Regulation as above quoted. That language of the Regulation aptly describes the notice of the assessment of deficiency taxes, which the Treasurer is required to send to the taxpayer by registered mail, under section 57(a) of the 1925 Act (Appendix, *infra*, p. 54). And, upon receipt of such "notice", the taxpayer actually does have, under the 1925 Act, substantially the elections that are stated in this Regulation as quoted in Respondent's Brief in Opposition (pp. 19-20).

E. But, under the 1925 Act, all of that language of the Regulation necessarily applies only to "deficiency taxes". All of this, by its own express wording, relates only to

what the taxpayer may do *after* he has received this "notice", under section 57(a) of the Act.²²

F. Hence, in the present case, which does not relate to "deficiency taxes",—nor to any taxes paid after the taxpayer had received any kind of a "notice" from the Treasurer,—but relates, on the contrary, wholly to taxes voluntarily paid, under the Act of 1925, coincidentally with filing the taxpayer's income tax return and in accordance with the amount shown due by the taxpayer itself upon the face of its own return,—the insular courts were correct in disregarding this regulation, as did also JUDGES WILSON and MORTON in the Circuit Court of Appeals.

Point IX

The opinions of the majority Judges of the Circuit Court of Appeals erred in overlooking or ignoring the *second* or "*subsidiary*" question presented on the record in this case. ("Questions Presented", *ante*, p. 3).

If, as petitioner believes to be clear, no right of appeal is given by the statute to the Board of Review and Equalization from the Treasurer's determination of the "correct amount of the tax" in any cases other than those relating to deficiency taxes, then it follows that the Board of Review had no jurisdiction to entertain the second appeal to that Board taken by the plaintiff sugar company here from the Treasurer's determination of the tax on March 28, 1930, allowing a refund of \$525.56, but not allowing more (R. 6; *ante*, pp. 11-12); and there-

²² Under the prior 1921 act, as above pointed out (*ante*, pp. 26-27), the taxpayer received this "notice" before he was required or expected to make any tax payment at all; and hence the "notice" applied,—and this language of the Regulation (or substantially the same language under prior regulations) was, therefore, properly applicable,—to all income taxes; instead of, as under the present 1925 Act, only to "deficiency taxes".

fore that the Treasurer was not bound in any way by the decision of the Board on that second appeal (or by the decision on the first appeal in so far as it purported to do more than to disallow the deficiency tax); and, hence, that the plaintiff's "Amended Complaint" is fatally defective, and states no cause of action, and that the demurrer to it was properly sustained, because *it contains no allegation upon which any conclusion can be based concerning the correctness, in fact, of the Treasurer's determination, or of that of the Board, or of the original calculation of the sugar company itself upon which it made its own voluntary tax payment upon its own original tax return, as to the item of "Repairs" for its fiscal year 1926, involved in the calculation, by the respective different parties, of the "correct amount of the tax", as alleged in the "Amended Complaint" (R. 2-8). The Amended Complaint relies solely upon the assumption that the Treasurer was bound by the Board's decision, and "disobeyed it" (Par. XIII, R. 6).*

As to this point, therefore, JUDGE MORTON was correct in saying in his dissenting opinion (R. 42-43):

"In the Sugar Company case the claim for refund rested on changes in income or deductions made by the taxpayer after the tax had been voluntarily paid. They were not approved by the Treasurer. It does not appear that the Sugar Company's claim was established beyond fair doubt nor that it was clearly the duty of the Treasurer to accept it."

CONCLUSION

The unanimous decision of the Supreme Court of Puerto Rico, in accord with its decisions in the earlier *Fertilizer* case and in that of *Compañía Agrícola de Cayey, Ltd., vs. Domenech, Treasurer*, with which JUDGE MORTON agreed in substance in his dissenting opinion in

the Circuit Court of Appeals, was right, and should be affirmed; and the judgment of the Circuit Court of Appeals, entered upon the majority opinions of PRESIDING JUDGE BINGHAM and JUDGE WILSON, vacating that of the Supreme Court of Puerto Rico, was wrong and should be reversed.

Respectfully submitted,

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
*Solicitor for the Department of the Interior,
Of Counsel.*

APPENDIX

APPENDICES

APPENDICES

APPENDIX I

Pertinent Sections of Puerto Rican "Income Tax Act of 1924"; Act of August 6, 1925; Laws of 1925, pp. 400, 512, 526, 536-540.

PAYMENT OF INDIVIDUAL'S TAX AT SOURCE

Section 22.—(a) All persons, in whatever capacity acting, including lessees or mortgagors or real or personal property, fiduciaries, employers, and all officers and employees of The People of Porto Rico having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, commissions, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, of any non-resident individual not a citizen of Porto Rico, or of any partnership not engaged in trade or business within Porto Rico and not having any office or place of business therein and composed in whole or in part of nonresident individuals not citizens of Porto Rico (other than income received as dividends of the class allowed as a credit by subdivision (a) of section 18) shall (except as otherwise provided in regulations prescribed by the Treasurer under section 19) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 6 per centum thereof; *Provided*, That the Treasurer may authorize such tax to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent.

(b) Every person required to deduct and withhold any tax under this section shall make return thereof on or before March 15 of each year and shall on or before June 15 pay the tax to the official of The People of Porto Rico authorized to receive it. Every such person is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this section.

(c) Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient or such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(d) If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be recollected from the withholding agent; or in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

Section 23.—(b) If accrued taxes when paid differ from the amounts claimed as credits by the taxpayer, or if any tax paid is refunded in whole or in part, the taxpayer shall notify the Treasurer, who shall redetermine the amount of the tax due under Parts I and II of this title for the year or years affected, and the amount of tax due upon such redetermination, if any, shall be paid by the taxpayer upon notice and demand by the Treasurer, or the amount of tax over-paid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 64. In the case of such a tax accrued but not paid, the Treasurer as a condition precedent to the allowance of this credit may require the taxpayer to give a bond with sureties satisfactory to and to be approved by the Treasurer in such sum as the Treasurer may require, conditioned upon the payment by the tax payer of any amount of tax found due upon any redetermination; and the bond herein prescribed shall contain such further conditions as the Treasurer may require.

TIME AND PLACE FOR FILING INDIVIDUAL AND FIDUCIARY RETURNS

Section 27.—(a) Return (except in the case of non-resident individuals not citizens of Porto Rico) shall be

made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March. In the case of a nonresident individual not a citizen of Porto Rico returns shall be made on or before the fifteenth day of the sixth month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of June. The Treasurer may grant a reasonable extension of time for filing returns if application therefor is made before the date prescribed by law for filing the returns, whenever in his judgment good cause exists, and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than ninety days.

CORPORATION OR PARTNERSHIP RETURNS

Section 37.—(a) Every corporation or partnership subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer, or by a managing partner or any other person empowered to do so. If any foreign corporation has no office or place of business in Porto Rico, but has an agent in Porto Rico, the return shall be made and sworn to by the agent. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations or partnerships, such receivers, trustees, or assignees shall make returns for such corporations or partnerships in the same manner and form as corporations or partnerships are required to make returns. Any tax due on the basis of such returns made by receivers, trustees in bankruptcy or assignees shall be

collected in the same manner as if collected from the corporations or partnerships of whose business or property they have custody and control.

TIME AND PLACE FOR FILING CORPORATE OR PARTNERSHIP RETURNS

Section 39.—(a) Returns of corporations or partnerships shall be made at the same time as is provided in subdivision (a) of section 27, except that in the case of foreign corporations not having any office or place of business in Porto Rico returns shall be made at the same time as provided in section 27 in the case of a nonresident individual not a citizen of Porto Rico.

(b). Returns shall be made to the Treasurer.

PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES

Date on Which Tax Shall be Paid

Section 53.—(a) Except as provided in subdivisions (a) and (c) and (d) of this section the total amount of tax imposed by this title shall be paid—

(1) In the case of a taxpayer, other than a nonresident individual not a citizen of Porto Rico, and other than a foreign corporation not having an office or place of business in Porto Rico, on or before the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on or before the fifteenth day of the third month following the close of the fiscal year; and

(2) In the case of a nonresident individual not a citizen of Porto Rico, and of a foreign corporation not having an office or place of business in Porto Rico, on or before the fifteenth day of June following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on or before the fifteenth day of the sixth month following the close of the fiscal year.

(b) (1) The taxpayer may elect to pay the tax in two equal installments, in which case the first installment shall be paid on or before the latest date prescribed in subdivision (a) for the payment of the tax by the taxpayer, and the second installment shall be paid on or before the fifteenth day of the sixth month after such date.

(2) If any installment is not paid on the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from Treasurer.

EXAMINATION OF RETURN AND DETERMINATION OF TAX

Section 54.—As soon as practicable after the return is filed the Treasurer shall examine it and shall determine the correct amount of the tax.

OVERPAYMENTS

Section 55.—If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 64.

DEFICIENCY IN TAX

Section 56.—As used in this title the term “deficiency” means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

Section 57.—(a) If, in the case of any taxpayer, the Treasurer determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 30 days after such notice is mailed the taxpayer may file an appeal with the Board of Review and Equalization, alleging in writing and under oath the legal facts and grounds on which such appeal is based.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the Treasurer. No part of the amount determined as a deficiency by the Treasurer but disallowed as such by the Board shall be assessed, but a proceeding in a district court of competent jurisdiction may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 60 has expired.

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX

Section 60.—(a) Except as provided in section 61 and in subdivision (b) of section 57 and in subdivision (b) of section 62—

(1) The amount of income and excess-profits and the amount of income taxes imposed by this Act or by Income Tax Act No. 59, of 1917, Income Tax Act No. 80 of 1919, Income Tax Act No. 43 of 1921, or by any of said Acts, as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

CLAIMS IN ABATEMENT

Section 62.—(b) If a claim is filed as provided in subdivision (a) of this section the Treasurer shall by registered mail notify the taxpayer of his final decision on the claim. The taxpayer may within 30 days after such notice is mailed file an appeal with the Board of Review and Equalization. If the claim is denied in whole or in part by the Treasurer (or by the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the Treasurer, and the amount, the claim for which is allowed, shall be abated. A proceeding in court may be begun for any part of the amount claim for which is allowed by the Board. Such proceedings shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 60 has expired.

CREDITS AND REFUNDS

Section 64.—(a) Where there has been an overpayment of any income or excess-profits tax imposed by this

Act, or by Income Tax Act No. 59 of 1917, Income Tax Act No. 80 of 1919, and Income Tax Act No. 43 of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

When a payment has been made of any income or excess-profits tax under the Income Tax Act No. 43 of 1921, as amended, for the calendar year 1924, or for any fiscal year ending in 1925, the amount of such payment shall be credited to any income or excess-profits tax then owed by the taxpayer pursuant to the provisions of this Act or of the acts hereinbefore amended in this subdivision of any amendment thereof, and any balance of such excess shall be immediately reimbursed to the taxpayer.

(b) Except as provided in subdivision (c) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) If the invested capital of a taxpayer is decreased by the Treasurer, and such decrease is due to the fact that the taxpayers failed to take adequate deductions in previous years, with the result that there has been an overpayment of income or excess-profits taxes in any previous year or years, then the amount of such overpayment shall be credited or refunded, without the filing

of a claim therefor, notwithstanding the period of limitation provided for in subdivision (b) has expired.

(d) Where there has been an overpayment of tax under section 22 or 35 any refund or credit made under the provisions of this section shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

(c) This section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

CLOSING BY TREASURER OF TAXABLE YEAR

Section 65.—(a) If the Treasurer finds that a taxpayer designs quickly to depart from Porto Rico or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current rent unless such proceedings be brought without delay, the Treasurer shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this

section the finding of the Treasurer, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design.

(b) A taxpayer who is not in default in making any return or paying income or excess-profits tax under any Act of the Legislature of Porto Rico may furnish to The People of Porto Rico, under regulations to be prescribed by the Treasurer, security approved by the Treasurer, that he will duly make the return next thereafter required to be filed and pay the next thereafter required to be paid. The Treasurer may approve and accept in like manner security for return and payment of taxes made due and payable by virtue of the provisions of this section, provided the taxpayer has paid in full all other income or excess-profits taxes due from him.

(c) If security is approved and accepted pursuant to the provisions of this section and such further or other security with respect to the tax or taxes covered thereby is given as the Treasurer shall from time to time find necessary and require, payment of such taxes shall not be enforced by any proceedings under the provisions of this section prior to the expiration of the time otherwise allowed for paying such respective taxes.

(d) In the case of a citizen of Porto Rico about to depart from Porto Rico, the Treasurer may, at his discretion, waive any or all of the requirements placed on the taxpayer by this section.

(e) No individual not a citizen of Porto Rico shall depart from Porto Rico unless he first procures from the Treasurer a certificate that he has complied with all the obligations imposed upon him by the income and excess-profits tax laws.

(f) If a taxpayer violates or attempts to violate this section there shall, in addition to all other penalties, be

added as part of the tax 25 per centum of the total amount of the tax or deficiency in the tax, together with interest at the rate of 1 per centum a month from the time the tax became due.

RULES AND REGULATIONS

Section 68.—The Treasurer is authorized to prescribe all needful rules and regulations for the enforcement of this Act.

REFUNDS

Section 75.—The Treasurer is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to The Legislature of Porto Rico at the beginning of each regular session of all transactions under this section.

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER

Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Porto Rico.

Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence, and the hearing shall be set promptly for final decision.

If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case sufficient legal grounds and facts for applying again to the Board

for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of Porto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.

(c) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

Section 66, Act No. 80, approved June 26, 1919, "Income Tax Law of 1919"; Laws of Puerto Rico, 1919, pp. 612-672:

REFUND OR ABATEMENT OF TAXES

Section 66.—That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.

That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without

legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act.

Section 63, Act No. 43, approved July 1, 1921, "Income Tax Law of 1921"; Laws of Puerto Rico, 1921, pp. 312-356:

Section 63.—That all laws or parts of laws in conflict herewith are hereby repealed; but the provisions thereof shall continue in force as regards the levying and collection of all taxes accrued thereunder, and for the levying and collection of all fines imposed or that may be imposed in connection with said taxes.

APPENDIX II

Section 1014 of Federal "Revenue Act of 1924", Act of June 2, 1924, c. 234, 43 Stat. 253, 343.

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER

Sec. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. * * * *

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act."

APPENDIX III

PORTO RICO FERTILIZER COMPANY vs. MANUEL U. DOMENECH,
TREASURER

Pertinent portion of opinion of Supreme Court of Puerto Rico on Rehearing, July 23, 1936 [CHIEF JUSTICE DEL TORO], 50 P. R. Dec. 405, 410-414; translation appearing in the printed transcript of the record (pp. 27-32) in that case on its appeal to the Circuit Court of Appeals, First Circuit, No. 3274 in that Court.

Section 75 of said law authorizes the Treasurer to remit, refund and return any taxes erroneously or illegally assessed or collected and penalties collected without authority, and any tax that appears to have been unjustly levied or for an excessive amount or for any reason erroneously collected.

The authorization cannot, in fact, be more ample. The Treasurer acts by himself. He is called upon to judge the merits of each claim. By said Section 75 he is only charged with the duty of rendering a report to the Legislature of Puerto Rico, at the inception of each regular session, of all the transactions carried to effect by him in the exercise of said authorization.

The taxpayer is called upon to render his income tax return and, as soon as practicable after the filing of said return, the Treasurer of Puerto Rico shall examine the same and determine the exact amount of the tax.

If the taxpayer declares no taxable amount, or if he does not file a return, the deficiency shall be the excess of the tax over the amounts previously assessed. When he so determines, the Treasury shall notify the taxpayer and the latter, within thirty days from the date that the notice is deposited in the postoffice, may file an appeal with the Board of Review and Equalization stating the facts and grounds of his claim, in writing and under oath.

If the Board decides in favor of the taxpayer he shall not be liable for any part of the deficiency determined by the Treasurer and disallowed by the Board, and the

Treasurer shall have the right, within the term of one year, to institute an action in a district court of competent jurisdiction, without assessment, for the collection of any part of the amount so disallowed. Of course, in such an action the taxpayer shall have the opportunity to defend himself, and judgment shall be rendered in accordance with the facts and the law.

The foregoing is more clearly provided by Sections 54, 56 and 57 of the law. See also Sections 62 and 64.

Section 76(a) provides that the decisions of the Board shall be final and the taxpayer shall pay the tax under protest if he wishes to resort to the courts of justice.

Section 76 further provides that any actions so instituted by taxpayers shall have preference in the dockets of the courts, and the defendant shall set forth all his defenses at once and in one single writing and the case shall be promptly set and decided in one hearing.

Said section goes on to provide about the reconsideration by the said Board, and then commands that:

“(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.”

Does this subdivision (b) mean that after the Treasurer denies the claim and said denial is affirmed by the Board a claim for refund ~~has~~ to be filed and if the Treasurer refuses it appeal again to the Board in order to be able to resort to the courts of justice?

Such is the meaning, at first glance, of the terms of the law itself, and we so decided in the opinion rendered as grounds for the judgment which was made ineffective by the order of January 14th last.

Nevertheless, a careful consideration of the matter carries us to the conclusion that it is not possible that such was the intent of the legislator. Why such duplicity? If the Treasurer denies and the Board affirms his denial and the taxpayer pays under protest, why resort again to the Treasurer and why appeal again to the Board?

This court had already said in the case of *American Colonial Bank of Porto Rico vs. Domenech, Treasurer*, 43 D. R. R. 889, 891. "We also agree with appellant that, if after appealing to the Board of Review and Equalization a taxpayer pays under protest, it is not necessary, once payment is made, to resort to said Board. The legislative intent was to grant a cause of action after payment under protest. Nevertheless, when drafting the said opinion in this case, our previous opinions were overlooked and when our attention was called to that oversight a reconsideration was granted and the case was reopened for a new discussion and decision of the issues of the same.

It is therefore clear that when the taxpayer, feeling aggrieved by the income tax levied by the Treasurer, files his claim with said official and his claim is denied and he appeals to the Board, which also decides the case against him, and he then pays under protest, he may, within the term of thirty days fixed by Law No. 74 of 1925, Section 76, first paragraph, resort to the courts of justice without any other preliminary requisite, that is, without having to file a petition for refund with the Treasurer and without having to appeal again to the Board of Review and Equalization.

As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of jus-

tice without paying under protest. If said taxpayer feels aggrieved by the tax assessed, he may, within thirty days after being notified, appeal to the Board and obtain that said Board overrule the deficiency determined by the Treasurer, as provided in Section 57 of said law, and he may, if the decision of the Board is against him, pay under protest and, within thirty days after payment, resort to the courts of justice, availing himself of the right granted by Section 76 of the said law of 1925. He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice.

The non-existence of the appeal to the courts when payment is not made under protest is a matter already decided by this court in the case of *Compañía Agrícola de Cayey vs. Domenech, Treas.*, 47 D. P. R. 535, 539, as follows:

"It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by means of law suit also disappeared. From 1921 on the payment under protest was an express condition preliminary to the initiation of a law suit. Though the law of 1921, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the refund of the taxes could be obtained. And such was the general understanding. We have before us an illustrative chart prepared by the Economic Commission of the Legislature containing the laws now in force, and the law of 1919 is omitted therefrom. Generally, though the time elapsed is not so long, taking into consideration the contemporary construction, the law of 1919

is no longer in force. Therefore, though the law of 1925 granted the substantive right of filing appeal with the Treasurer even if the taxes were not paid under protest, said law did not keep in force or revive the remedy granted by the law of 1919."

The decisions in *Serrallés vs. Treasurer*, 30 P. R. R. 220, and *McCormick vs. Bonner*, 44 D. P. R. 432, cited by the *amicus curiae*, are not applicable because they are based on the repealed law of 1919.

Therefore, under any phase that the case is considered the judgment appealed from should be affirmed.

APPENDIX IV

Political Code, Sections 308, 310 and 313, as amended by Act of August 2, 1923 (Laws of 1923, pp. 604-608).

Section 308.—For the purpose of revising the assessment and reassessment of real and personal property as provided by this Title, and for the purpose of passing on all claims made by taxpayers in respect to the assessment of their properties and the levying of property and income taxes, there shall be in the Department of Finance a permanent Board of Review and Equalization with an open office, to be composed of the Treasurer of Porto Rico and four persons versed in matters pertaining to the levying of taxes in Porto Rico, two of whom shall be agriculturists. Two additional members of the Board of Equalization and Review shall be elected at the next general election in the manner in which two Public Service Commissioners are at present elected, and the Commissioners so elected, together with the other five who are appointed, shall finally form the board, which up to that time shall be composed of the five appointed members. These persons shall be appointed by the Governor, with the advice and consent

of the Senate of Porto Rico, and shall hold office for two years, or until their successors shall have been appointed and shall have qualified, and they shall receive compensation at the rate of ten (10) dollars for each day's attendance at meetings of the board, and actual cost of transportation necessarily incurred. Each member of said board shall take an oath fairly and impartially to pass upon questions coming before them according to law. Any three members shall constitute a quorum. The Treasurer shall be *ex-officio* chairman of said board. The Public Service Commissioners of all the municipalities of the island may attend the meetings of the Board, and shall have a voice therein when so required in such cases as may relate to appeals from assessments of property located in their respective municipalities.

Section 310.—Said Board of Review and Equalization shall meet in regular session in the months of January, May and September of each year, and in special session at such other times as may be necessary in the opinion of the chairman. At said meetings the board shall hear appeals received and shall decide questions arising before the board relative to the greater or lesser amount at which property may be assessed for the purpose of taxation, or to the amount of taxes, or to exemptions from taxations, or to fix the income tax of any taxpayer; and upon recording such determination, the board shall correct returns, and liquidate taxes to be levied on income returns filed, in accordance with its decision, and shall report the facts to the Department of Finance for such corrections, cancellations or issuance of receipts as may be proper. Said board shall have power to strike out, lessen or increase the valuations made in any schedule returned to it, whether or not complaint has been made in connection therewith, and to decide all other complaints in regard to the levying of property and income taxes, and to correct all errors as such errors are brought

to its attention. For just cause the board may also reconsider, at its discretion and in its judgment, any decision made by it when so requested by a taxpayer within the unextendable term of thirty days counting from the date of service of notice. In performing the duties imposed on it by this Title, said board may examine, under oath or affirmation, any person who may have knowledge or information concerning the value of property subject to taxation, and any member of the board may administer the oath or affirmation.

Section 313.—The said Board of Review and Equalization shall return to the Department of Finance all returns, income tax returns, books, schedules and papers received or used by it in its work of correction and revision. The Treasurer shall furnish said board such assessors or inspectors as it may need in its investigations, as well as such books and documents as may be necessary for the proper performance of the duties of said board.

Office - Supreme Court U. S.

FILED

MAR 8 1939

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,

Petitioner,

VS.

YABUCOA SUGAR COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

I.

Preliminarily: "Questions Presented".

1.—Respondent restates (*Brief*, p. 3) mistakenly the "Questions Presented".

The only questions really here presented on this record are those stated in the brief for petitioner (pp. 2-3), viz.:

(a) Whether a taxpayer may maintain an action in court, in the nature of an appeal from the Treasurer's determination of the "correct amount of the tax" under the Income Tax Law of Puerto Rico, against the Treasurer, for a refund of supposed overpayments of income

taxes paid voluntarily and without protest in accordance with the taxpayer's own income tax return; and

(b) Whether the Board of Review and Equalization has any jurisdiction to review and to bind the Treasurer by its decision on such a question of voluntary payment made without protest.

2.—Involved also, is, as Respondent agrees (*Brief*, p. 3) the question whether the decision of the Supreme Court of Puerto Rico is so "clearly wrong" as to deprive it of the respect paid, under the established rule, to the decision of a local Territorial Supreme Court interpreting a local Territorial statute.

II.

"Contentions of Respondent" (*Brief*, pp. 4-6).

1.—Respondent's "Contentions" numbered "(2)", "(3)", and "(4)" are beside the mark. Petitioner has raised no question in relation to that numbered "(2)".

As to "(3)" and "(4)", the defendant Treasurer demurred to the complaint on two grounds (R. 6) viz.: (1) That it did not allege that the tax had been paid under protest; and (2) "*Because the Complaint does not state facts sufficient to constitute a cause of action*".

The District Court sustained the demurrer, referring in its opinion only to the first ground stated by the Treasurer, without finding it necessary to discuss the second ground. The Supreme Court of Puerto Rico affirmed the decision. It seems strange doctrine to say that the Treasurer, in support of the decision in his favor, may not rely upon any ground stated in his demurrer, whether or not it was specifically discussed in the decision of the court in his favor; or to say that, in such a state of the pleadings,

"the burden was on the Treasurer to raise questions of fact by answer" (*Respondent's Brief*, p. 6). JUDGE MORTON properly called attention to this question appearing on the face of plaintiff's own complaint, when he said, in his opinion in the Circuit Court of Appeals (R. 36):

"It does not appear that the Sugar Company's claim was established beyond fair doubt nor that it was clearly the duty of the Treasurer to accept it."

2.—Under its heading "Nature of the Action" (*Brief*, p. 2), respondent mistakenly criticizes our statement (*Petitioner's Brief*, p. 1) of the nature of the action. Petitioner did not say, as respondent mistakenly thinks, that this action is technically an "appeal" from the Treasurer's decision; but said, *correctly*, (*Petitioner's Brief*, p. 1),

"an action, practically in the nature of an appeal from the insular Treasurer's decision".

III.

Respondent expressly concedes (*Brief*, "Third", p. 16) the correctness of our Point I (*Petitioner's Brief*, pp. 22-23) that the Legislature was not obligated to provide any remedy by suit in court for taxpayers claiming to have made overpayments of taxes voluntarily and without protest.

But respondent attempts to avoid the force of this concession (and of the established rule on which it is based) by contending (*Brief*, "Second", pp. 12-15) that if the power of the Treasurer to determine "the correct amount of the tax" under sections 54, 55, 64, and 75 of the Act "is a discretionary matter in the Treasurer" (*Insular Supreme Court's opinion of March 17, 1937*, R. 21), then, as respondent now contends (*Brief*, p. 13)

"the Legislature has delegated its *legislative power* to the Treasurer and this it cannot do, as no such authority is conferred on the Legislature by the Organic Act". (*Italics supplied*)

In other words, that it is a delegation of legislative power to an executive officer. In support of this, respondent cites and quotes (*Brief*, pp. 13, 14-15) *United States vs. Laughlin*, 249 U. S. 440, 443.

But respondent fails to notice that, in the *Laughlin* case, this court was dealing wholly with a determination by the Secretary of the Interior of a *pure question of law*, and not at all, as in the present case, with a question of fact. In the *Laughlin* case this court, immediately following that portion of its opinion which is quoted in respondent's brief, proceeded to say (249 U. S., at p. 443):

"In our view it was the intent of Congress that the *Secretary should have exclusive jurisdiction to determine disputed questions of fact*, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts. In the case before us the facts were not in dispute and were shown to the Secretary's satisfaction; whether, as a matter of law, they made a case of excess payment, entitling claimant to repayment under the act of 1908, was a matter properly within the jurisdiction of the Court of Claims". (*Italics supplied*)

In the *Laughlin* case the effect of upholding the Secretary's decision would have been to say that the Secretary might change the price of public lands to \$2.50 an acre, despite the act of Congress directing their sale at \$1.25 an acre. In other words, to delegate legislative power to the Secretary, in effect, to change the act of Congress.

No such question is here presented. The question here, upon which the various parties concerned, the Company itself, the Treasurer, and the Board of Review and Equal-

ization, differed, was a question of fact, *viz.*, as to how much of the Company's "repairs" made during the year 1926 were strictly current "repairs" for which it was entitled to take credit as current expenses of the business, and how much were really in the nature of permanent "improvements" (*Complaint*, Pars. VII, VIII; R. 4).

The clear meaning, and limitations, of the opinion in the *Laughlin* case are stated by this court in the later *Babcock* and *Dismuke* cases cited in our brief (*Brief for Petitioner*, p. 22).

In the *Babcock* case (*United States vs. Babcock*, 250 U. S. 328, 331) it is pointed out that the "general rules" are "well settled", *viz.*:

- (1) "That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts"; and
- (2) "That where a statute creates a right and creates a special remedy, that remedy is exclusive".

With reference to the *Laughlin* case, MR. JUSTICE BRANDEIS says, in the opinion in the *Babcock* case, after laying down the "general rules" as above quoted (250 U. S., at p. 331):

"Still the fact that the right and the remedy are thus intertwined might not, if the provision stood alone, require us to hold that the remedy expressly given excludes a right of review by the Court of Claims, *where the decision of the special tribunal involved no disputed question of fact and the denial of compensation was rested wholly upon the construction of the act*". (*Italics supplied*)

The same limitation upon the meaning of the *Laughlin* case is reiterated in the *Dismuke* case, *supra*, where this

court, after stating the general rule that (*Dismuke v. United States*, 297 U. S. 167, 172):

"If the statutory benefit is to be allowed only in his" [the administrative officer's] "discretion, the courts will not substitute their discretion for his. . . . If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, see *Silberschein v. United States*, . . . ; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized, *Lloyd Sabauda Societa v. Elting*, 287 U. S. 329, 330, 331,"

adds (*ibid.* at p. 172)

"But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled."

citing the *Laughlin* case, and other earlier cases.

The rules are well established, and are plain. Under them the Legislature of Puerto Rico clearly had the power to make the administrative determination of the executive officer, the Treasurer, final, as to disputed questions of fact, such as that here involved; as indeed the respondent itself expressly concedes (*Brief*, "Third", p. 16). That was what the Legislature plainly and emphatically intended (*Petitioner's Brief*, pp. 29-34); and the insular Supreme Court unanimously so held.

IV.

1.—Respondent is mistaken in saying that the Supreme Court of Puerto Rico held "that the provisions of sections 76(a) . . . are applicable" and that "all three Judges of

Circuit Court of Appeals" as well as this petitioner himself "disagree" with the Supreme Court in this.

The record shows that the Supreme Court of Puerto Rico *did not* hold section 76(a) applicable here on this petition to the Treasurer for refund of supposed voluntary overpayment of income taxes; but, to the contrary, held section 75 to be the section applicable, with which the court wholly agree. The court said (R. 20-21): "Under section 75 * * * the Treasurer is authorized * * *".

In the Circuit Court of Appeals, JUDGE MORTON agreed, we do, with the insular Supreme Court, that the case is governed by section 75, in connection with sections 54, 55, and 64. JUDGES BINGHAM and WILSON thought they found in section 76(b) authority for (1) appeal to the Board of Review and (2) authority for recourse from the Treasurer to the courts.

Everyone agrees that section 76(a) has nothing to do with this case. Section 76(a) relates solely to deficiency taxes (*Brief for Petitioner*, pp. 7-9, 15-18).

~~Respondent~~ contends (*Brief*, p. 11, *et seq.*) that the decision of the Supreme Court of Puerto Rico, as well as the opinion of JUDGE MORTON, and petitioner's position there, would make section 76(b) "mean nothing".

But that is far from correct. As we have already pointed out (*Brief for Petitioner*, "Point IV", pp. 29-35) section 76(b) was enacted by the Legislature for a very important purpose, viz., that of emphasizing and driving home the legislative intent that there should be no recourse to the courts from decisions of the Treasurer under section 75 on petitions for refund of supposed overpayments of taxes made voluntarily and without protest or objection of any kind.

As was pointed out in the opinion of this court in the *Babcock* case, *supra* (*United States vs. Babcock*, 250 U. S. 328, 331), this, in itself, may be a very important legislative purpose. As this court there said with relation to the statute before the court in that case,

“These words clearly express the intention to confer upon the Treasury Department exclusive jurisdiction and to make its decision final.

V.

It is believed that other matters are sufficiently covered in our original *Brief for Petitioner*. As there said, the judgment of the Circuit Court of Appeals, entered upon the majority opinions of PRESIDING JUDGE BINGHAM and JUDGE WILSON should be reversed, and in accordance with the dissenting opinion of JUDGE MORTON, the judgment of the Supreme Court of Puerto Rico should be affirmed.

Respectfully submitted,

/ WILLIAM CATTEON RIGBY,
Attorney for Petitioner.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico,

/ NATHAN R. MARGOLD,
*Solicitor for the Department of the Interior,
Of Counsel.*

FILE COPY

U.S. - Supreme Court, U. S.
FILED

MAR 10 1939

CHARLES ELWINE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

vs.

YABUCOA SUGAR COMPANY,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL
MEMORANDUM

*To the Chief Justice and the Associate Justices of the
Supreme Court of the United States.*

In reply to respondent's supplemental memorandum being filed to-day by leave of court after the argument we venture here to sum up essential points of petitioner's argument:

1. The Legislature, in providing taxpayers a remedy for recovery of voluntary supposed overpayments of income taxes by petition to the Treasurer under section 75 of the Act, was under no obligation to provide any recourse to the courts from the Treasurer's decision of the

"correct amount of the tax". *United States v. Babcock*, 250 U. S. 328, 331; *Dismuke v. United States*, 297 U. S. 167, 171-172. (This we understand to be really conceded; despite respondent's discussion of the *Laughlin* case in its brief and its supplemental memorandum filed to-day). The question is: What was the intention of the Legislature?

2. The following are *indicia* of the intent of the Legislature to make the Treasurer's decision final:

(a) That intent harmonizes with the general scheme of the Act. The taxpayer is to make his own income tax return, and, without waiting for any notice, is to pay the amount that he himself calculates as the tax (Secs. 24-27, 37-45, 53; "Brief for Petitioner", p. 4). The Treasurer is then to examine the return and to "determine the correct amount of the tax" (Sec. 54); and, in case he finds that the taxpayer has overpaid the amount which the Treasurer has thus "determined" to be "the correct amount of the tax", then that amount is to be credited or refunded to the taxpayer (Secs. 55, 64). And a taxpayer at any time within four years [Sec. 64(b)] may petition the Treasurer; and the Treasurer, under section 75, "is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected", and to report his actions to the Legislature; i.e., to refund all collections in excess of what the Treasurer thus "determines" under these sections 54, 55, 64, and 75 to be "the correct amount of the tax".

(b) Finality of the Treasurer's decision under those sections is in accord with the "general rules" which this court in the *Babcock* case said are "well settled" (*United States v. Babcock*, *supra*, 250 U. S. 328, 331), viz.:

- (1) "That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts"; and

(2) "That where a statute creates a right and creates a special remedy, that remedy is exclusive".

(c) If the Legislature had intended that the settlement of the insular revenues should be tied up by possibly long litigation in the courts in the nature of appeals from the Treasurer's "determination" of the "correct amount of the tax" upon claims for refund of voluntary supposed overpayments, then it would scarcely have allowed so long a period as *four years* [Sec. 64(b)] for presenting such claims, in the face of the fact that it was expressly limiting to the short period of *thirty days* the taxpayer's right to appeal to the Board from *deficiency assessments* by the Treasurer [Sec. 57(a)], and likewise limiting to the same short period of thirty days the time for bringing suit in court after the Board's decision and payment under protest [Sec. 76(a)].

(d) Where the Legislature intended recourse to the courts or appeal to the Board (as in relation to deficiency taxes), it made *express provisions* to that end, expressly limiting the time within which the right might be exercised. It did not leave it to be gathered from inferences or from the absence of express enactment (Brief for Petitioner, Point II—E, p. 25).

(e) The Legislature in restoring by section 75 the authority of the Treasurer to make refunds of voluntary overpayments, in form quite analogous to that which had been given him by section 66 of the earlier Act of 1919, which had been wiped out by the Act of 1921, saw fit not expressly to restore the recourse to the courts from the Treasurer's decision which had expressly been given by the second paragraph of section 66 of the earlier 1919 Act, and which, under that 1919 Act, had been recognized and applied by the Supreme Court of Puerto Rico because of the express authority given by the second paragraph of that section 66 of that Act. (*Serralles vs. Treas-*

urer, 30 P. R. Rep. 220, 223-224; *McCormick v. Treasurer*, 44 P. R. Dec. (*Spanish ed.*) 432, 438-440. [*Confer* Brief for Petitioner, Point IV, pp. 29-32].

3. There is nothing in section 76(b) to override the intent of the Legislature, thus clearly indicated as above. Section 76(b) contains no affirmative words of grant. It is wholly negative. It is the second paragraph of a section, of which the first paragraph [sec. 76(a)] admittedly relates solely to deficiency taxes, and of which the title given to the whole section by the Legislature is "*Limitations upon suits and proceedings by the taxpayer*". As JUDGE MORTON said (R. 35):

"It says in effect that no suit shall be maintained in any court until a claim for refund shall have been filed with the Treasurer and on appeal with the Board of Review '*according to the provisions of law in that regard and the regulations established in pursuance thereof.*' The difficulty is that there are no provisions of law authorizing suits in court for the recovery of taxes voluntarily paid or empowering the Board of Review to deal with claims for refund on appeal from the Treasurer, or with taxes which have been paid." (*Italics are Judge Morton's*)

4. As noted in our "Brief for Petitioner" (Point IV, (6) (7), pp. 33-35) the Legislature modeled section 76(b) very closely upon the phraseology of section 3226 of the United States Revised Statutes as amended by section 1014(a) of the Federal Revenue Act of 1924, but the Legislature *significantly* omitted the provision of the Federal statute permitting "suit or proceeding" to be maintained "whether or not such tax * * has been paid under protest or duress". This omission by the Legislature was necessarily intentional and significant.

5. Section 1795 of the Civil Code of Puerto Rico to which respondent makes reference (*Brief*, p. 21) was

apparently not considered applicable by the Supreme Court of Puerto Rico, and was not mentioned anywhere in its opinion nor in the opinions of either of the Judges of the Circuit Court of Appeals. It is simply a statement of a general principle of law (section 1895 of the Spanish Civil Code) not greatly differing from the corresponding principles of the common law. It does not override the rule that the sovereign may not be sued, except with its own consent. Puerto Rico is "sovereign" in this respect. *Porto Rico v. Rosaly*, 227 U. S. 270.

The case of *South Porto Rico Sugar Co. v. Treasurer*, 26 P. R. Rep. 446, which respondent cites (*Brief*, p. 21), so far from supporting respondent's contention, expressly recognizes that the "rule is firmly established" that "taxes paid voluntarily cannot be recovered" [Syl., Point I, p. 446; June 29, 1918; in the absence, of course, of any express statutory authority for such recovery].

6. The decision of the Supreme Court of Puerto Rico that the Legislature intended to give finality to the Treasurer's decision of the "correct amount of the tax" on a petition for refund of a voluntary supposed overpayment, under section 75 of the Act, is surely not "clearly wrong". Under the settled rule of the respect to be paid to the decision of a local Territorial court of last resort construing a local statute, it should not be disturbed. JUDGE MORTON was correct in saying (R. 36):

"The Supreme Court" [of Puerto Rico] "accordingly held that with respect to voluntary overpayments the taxpayer was in the hands of the Treasurer on matters of refund, 'If the decision of the Treasurer is against him he cannot appeal from the same to Courts of justice.' This does not seem to me an unreasonable solution of the difficulty which confronted them. Indeed I incline to think it was right. Under the view, taken in the majority opinions, every tax which has been voluntarily paid without

protest may be reopened on claims for refund at any time within four years and resettled *de novo* in court proceedings. This is in fact what is approved by the decision in the Yabucoa Sugar case before us. Greater consideration is shown to voluntary overpayments than to deficiency assessments. This certainly is a wide departure from the view of the Supreme Court of Puerto Rico. It has often been said that in matters of local law the opinion of that court is not to be set aside unless clearly wrong. As I have said I incline to think the Supreme Court of Puerto Rico was right; I certainly do not think it was clearly wrong."

References to the record in this memorandum, as in our "Reply Brief", are to the record as printed by the Clerk of this Court. References in our "Brief for Petitioner" are to the pages of the record in the Circuit Court of Appeals filed here with the Petition for Certiorari ["Folios" in the record as printed here].

Respectfully submitted,

✓ WILLIAM CATTEON RIGBY,
Attorney for Petitioner.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico.

NATHAN R. MARGOLD,
*Solicitor for the Department of the Interior,
Of Counsel.*

FIL

Supre

RAFAI

**ON PETIT
CO**

BRIEF I

H. S. McC

fund at any
ovo in court
oved by the
e us. Great-
erpayments
rtainly is a
reme Court
hat in mat-
rt is not to
have said I
uerto Rico
was clearly

n, as in our
y the Clerk
Petitioner"
ourt of Ap-
Certiorari

JOBY,
Petitioner.

FILE COPY

FILED

JAN 14 1939

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1938.

No. 498.

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,
against

YABUCOA SUGAR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

✓ EARLE T. FIDDLER,
Attorney for Respondent,
Ochoa Building,
San Juan, Puerto Rico.

McCONNELL,
on the Brief.

f

TABLE OF CONTENTS

Brief of Respondent in Opposition

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES	2
STATEMENT OF CASE	2
STATUTES INVOLVED	5
CONTENTIONS OF PETITIONER	8
POINTS OF ARGUMENT	10
ARGUMENT	10
One—The insular Board of Review and Equaliza- tion has ample power under the Puerto Rican Income Tax Act of 1924 to determine the cor- rect amount of any income tax owing or thought to be owing by any taxpayer.....	10
Two—The Puerto Rican legislature has provided in the insular Income Tax Act an effective remedy by suit in the nature of an action at law for the recovery of overpayments of in- come taxes, even though made voluntarily and without protest	13
Three—The decisions of the Supreme Court of Puerto Rico in this case are clearly wrong....	21
CONCLUSION	26
APPENDIX A	27
APPENDIX B	29

TABLE OF CASES

<i>Brewster v. Gage</i> , 280 U. S. 327, 74 L. ed. 457.....	2
<i>Compañía Agrícola de Cayey, Ltd. v. Domenech</i> , 48 D. P. R. (Spanish ed.) 535	23, 24
<i>D. Ginsberg & Sons v. Popkin</i> , 285 U. S. 204	18
<i>Dismuke v. United States</i> , 297 U. S. 167.....	14, 15
<i>Domenech v. Verges</i> , 69 F. (2d) 714	2
<i>La Roque v. U. S.</i> , 239 U. S. 62, 60 L. ed. 147	2
<i>Méndez Hnos. v. Treasurer</i> , 51 P. R. R. 147 (Spanish ed.)	2
<i>Porto Rico Fertilizer Company v. Domenech</i> , 98 F. (2d) (Advance Sheets) 398-404, 1, 4, 5, 8, 24, 25 and opinions of insular Supreme Court, 49 D. P. R. 45.....	4
50 D. P. R. 405.....	1, 4
51 D. P. R. 67.....	1, 4
<i>Serrallés v. Treasurer</i> , 30 P. R. R. 220	2
<i>Tyson v. Commissioner</i> , 68 F. (2d) 584	2
<i>U. S. v. Morehead</i> , 243 U. S. 607, 61 L. ed. 926.....	2
<i>United States v. Laughlin</i> , 249 U. S. 440	15

STATUTES

FEDERAL

Judicial Code, Sec. 240(a), Act of February 13, 1925	2
Rev. Stat.	
Sec. 3220	25
Sec. 3226	25

	PAGE
Act No. 80, Income Tax Act of 1919	
Sec. 61	27
Sec. 63	2, 27
Sec. 66	2, 22, 23
Act No. 43, Income Tax Act of 1921	
Sec. 45	2, 27
Sec. 46	2, 27
Sec. 47	2, 27
Act No. 74, approved August 6, 1925, "Income Tax Act of 1924"	
Sec. 53	5
Sec. 54	5, 15, 23
Sec. 55	6, 15, 23
Sec. 57	7, 16, 18
Sec. 64(a)	6, 23
Sec. 64(b)	3, 6, 17, 18
Sec. 67	12
Sec. 75	7, 23
Sec. 76(a)	4, 5, 7, 8, 15, 20, 21, 24, 25, 26
Sec. 76(b)	7, 8, 16, 17, 18, 23, 24, 26
Regulations No. 1	19, 20, 21, 23
Political Code	
Secs. 308, 310, 313	2, 11, 12, 17



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1938.

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

vs.

YABUCOA SUGAR COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The only opinions of the insular District Court appear in the Order (R., 9-10) and Judgment (R., 16-17). The opinion of the insular Supreme Court on first hearing (R., 18) is reported in 50 P. R. R. (Spanish ed.) 962, and on reconsideration in 51 P. R. R. (Spanish ed.) 135. English editions of these volumes have not yet been published. The opinions of the judges of the Circuit Court are reported in 98 F. (2d) (Advance Sheets) 398-404. The three opinions of the Supreme Court of Puerto Rico in *Porto Rico Fertilizer Company v. Domenech* upon which its opinion in this case was based are attached hereto as Appendix B.

MICROCARD

TRADE MARK 

22



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

378

38-69



Jurisdiction.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

Questions Presented.

The only question involved is whether, after the Treasurer of Puerto Rico has denied a claim for credit and refund of amounts of income tax overpaid under the Income Tax Law of Puerto Rico of 1924, the taxpayer may maintain an action at law against the Treasurer for a refund of such overpayment, notwithstanding the fact that such payments were made voluntarily and without protest in accordance with the taxpayer's own income tax return.

Statutes.

Puerto Rican Income Tax Act of 1924 (Act No. 74, approved August 6, 1925). See *infra*, pp. 12, 14.

Puerto Rican Income Tax Act of 1921, sections 45, 46, 47. See appendix, p. 27.

Puerto Rican Income Tax Act of 1919, sections 63, 66. Appendix, p. 27.

Political Code of Puerto Rico, sections 308, 310, as amended by Act No. 75 of 1923 (Session Laws, pp. 604-606), see *infra*, p. 11.

Statement of Case.

The Yabucoa Sugar Company filed an income tax return with the Treasurer of Puerto Rico for the taxable year ended June 30, 1927, showing a taxable income of \$201,879.29, and paid a tax calculated on that basis (R., 2). Thereafter the Treasurer notified the taxpayer that he had

determined a deficiency, and demanded the payment of an additional tax, which together with interest amounted to \$1,301.51 (R., 2). Pursuant to the provisions of the local Income Tax Act and of the Political Code of Puerto Rico, the taxpayer appealed to the Board of Review and Equalization (R., 3). The Board undertook to examine the entire return filed by the taxpayer and, although in substantial agreement with the notice of deficiency appealed from, found that the taxpayer had failed to deduct certain amounts expended for repairs during the taxable year. In effect, the decision of the Board was to fix the taxpayer's income tax for the year in question at \$6,803.66 less than the amount actually paid by the taxpayer (R., 3-6).

The taxpayer thereupon filed a claim for credit and refund of the amount so appearing to have been overpaid with the Treasurer in February 1930, *that is, within four years after the date of the payment of the tax*, as permitted by section 64(b) of the Income Tax Act (R., 6). The Treasurer considered the claim and disagreed with the Board in part, but did determine that there had been an overpayment of \$525.56 (R., 6). The taxpayer again appealed to the Board of Review and Equalization within the time provided by law, and the Board reaffirmed its prior decision (R., 6).

The taxpayer then brought a suit in the nature of an action at law against the Treasurer in the Insular District Court of San Juan to recover the overpayment of \$6,803.66 and interest (R., 1-7). The Treasurer demurred on two grounds (1) that the court was without jurisdiction because payment had not been made under protest, and (2) that the complaint did not state facts sufficient to constitute a cause of action (R., 8). The district court did not pass upon the second ground of demurrer, but held that it was without jurisdiction and, after denying reconsideration, entered judgment dismissing the complaint (R., 16, 17).

Taxpayer appealed to the Supreme Court of Puerto Rico (R., 17). The Supreme Court was at the time considering and reconsidering a related case, *Porto Rico Fer-*

tilizer Company v. Domenech, in which its first opinion was rendered on November 13, 1935, its second opinion on July 23, 1936, and its third and final opinion on February 2, 1937.

The opinions of the Court in that case are set out in full in the Appendix (*infra*, p. 29). The Supreme Court thought that this case was governed by the same principles as those governing the *Porto Rico Fertilizer Case*, and dismissed the appeal without opinion on July 28, 1936 (R., 18). Taxpayer applied for reconsideration, and on March 17, 1937, the insular Supreme Court gave this case separate consideration (R., 23, 24), denying reconsideration.

The grounds upon which the Supreme Court of Puerto Rico finally based its decisions both in this and in the *Porto Rico Fertilizer Case* were (1) that the only authority to maintain suit against the Treasurer of Puerto Rico for recovery of income tax payments is found in section 76 (a) of the *Income Tax Act of 1924*, (2) that such permission is conditioned upon payment under protest and the filing of suit within thirty days after payment, and (3) that taxpayers had not complied with either of these conditions. The Court went on to state that under the Act in question the refund of taxes erroneously collected "is a discretionary matter in the Treasurer" (R., 24).

Both *Yabucoa Sugar Company* and *Porto Rico Fertilizer Company* appealed to the Circuit Court of Appeals (R., 25). The cases were heard on the same day, and for the purposes of its opinions, the Circuit Court consolidated the two appeals (R., 29-43). Each of the three judges wrote a separate opinion. Judge Bingham and Judge Wilson were in agreement that the judgment in the *Porto Rico Fertilizer Case* should be affirmed on the ground that no appeal had been taken to the insular Board of Review and Equalization and that the judgment in this case should be reversed. As petitioner correctly points out, the only distinction between the two cases is that in this case an appeal was taken to the Board of Review and Equalization, which had determined that there had been an overpayment of in-

the tax, while in the Porto Rico Fertilizer Case there had been no appeal to the Board.

Judge Morton dissented, feeling that the judgments of the Supreme Court of Puerto Rico should in both cases be affirmed, *but with leave to the Porto Rico Fertilizer Company to bring further proceedings by mandamus* (R., 43). As to the grounds upon which the Supreme Court decided the cases, there was no disagreement in the Circuit Court. All of the judges were in complete agreement that the Supreme Court of Puerto Rico was clearly wrong in holding that the duty of the Treasurer to credit or refund overpayments of income tax was merely discretionary. All the judges were in agreement that the insular Supreme Court was wrong in trying to find the taxpayer's remedy in section 76 (a) of the income tax act. The only disagreement in the Circuit Court was as to whether the Supreme Court, in spite of the erroneous grounds upon which it based its decisions, had reached the right *result*, and as to what proper remedy of the taxpayers really was.

Statutes Involved.

A mere recital of the pertinent provisions of the Income Tax Act in question is sufficient to demonstrate beyond question that the Supreme Court of Puerto Rico was wrong in trying to find taxpayer's remedy in section 76 (a) of the act, and in holding that the Treasurer's duty in this respect was discretionary and not mandatory.

Section 53 of the Act fixes the last day to file returns and provides that the first installment of the tax must be paid on or before that date. In other words, the taxpayer is required to calculate the amount of his own tax, file his own return, and pay the first installment without any action on the part of the Treasurer of Puerto Rico.

Section 54 provides :

"As soon as practicable *after the return is filed* the Treasurer shall examine it and shall determine the correct amount of the tax."

Section 55 provides:

"If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall *be credited* against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall *be credited or refunded* as provided in section 64."

Section 64 (a) and (b) provide:

"(a) *Where there has been an overpayment* of any income or excess-profits tax imposed by this Act, or by Income Tax Act No. 59 of 1917, Income Tax Act No. 80 of 1919, and Income Tax Act No. 43 of 1921, or any such Act as amended, the amount of *such overpayment shall be credited* against any income or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall *be refunded* immediately to the taxpayer.

"When a payment has been made of any income or excess-profits tax under the Income Tax Act No. 43 of 1921, as amended, for the calendar year 1924, or for any fiscal year ending in 1925, the amount of such payment shall *be credited* to any income or excess-profits tax then owed by the taxpayer pursuant to the provisions of this Act or of the acts hereinbefore amended in this subdivision or any amendment thereof, and any balance of such excess shall *be immediately reimbursed to the taxpayer*.

The italics have been supplied.

"(b) Except as provided in subdivision (c) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund."

Section 76 (b) provides:

"No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

Section 75 provides:

"The Treasurer is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to The Legislature of Puerto Rico at the beginning of each regular session of all transactions under this section.

If the Treasurer's examination of the return shows that there has been an *underpayment*, section 57 directs him:

"Section 57.—(a) If, in the case of any taxpayer, the Treasurer determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 30 days after such notice is mailed the taxpayer may file an appeal with the Board of Review and Equalization, alleging in writing and under oath the legal facts and grounds on which such appeal is based. . . ."

If the taxpayer is still dissatisfied after appeal to the Board of Review and Equalization, section 76 (a) tells him what to do:

"Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without preju-

dice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Puerto Rico.

“Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence and the hearing shall be set promptly for final decision. . . .”

It was from the unfortunate juxtaposition of sub-sections (a) and (b) of section 76 of the Act that the whole problem both in this case as well as in the Porto Rico Fertilizer Case has arisen.

Contentions of Petitioner.

Each of the three judges of the Circuit Court of Appeals appears to be in agreement as to the general scheme of the income tax act in question, and petitioner raises no issue as to this point. As stated by Judge Morton (R., 40, 41):

“There is no disagreement as to the general scheme of the statute under discussion. Income taxes imposed by it fall into two classes (1) those shown to be due on the face of the return, and paid voluntarily without objection or protest, (2) those collected on deficiency assessments. In regard to the latter there are careful and adequate provisions (Sections 57 and 76 (a)). If deficiency assessments are objected to the taxpayer may appeal to the Board of Review; if the Board of Review decides against him he must pay, and may sue in the courts to recover back the alleged illegal exaction.

“The present case does not relate to deficiency taxes; it concerns only taxes which were voluntarily paid without protest and deals only with claims for refund. *The statute provides very specifically for the return of overpayments without any requirement of*

objection or protest against the original payment. (Sections 53 (55), 64). These sections apply to voluntary overpayments, made presumably by mistake on the part of the taxpayer. It also authorizes and directs the Treasurer to repay erroneous or illegal collections and to report annually to the Legislature his transactions under this authority. (Section 75). While no express provision is made therefor it is not doubted that a person who has voluntarily overpaid his tax may apply to the Treasurer under these sections for a refund; *and it is clearly the Treasurer's duty if overpayment is established to make a proper refund.* The crucial question is who is to determine whether there has been overpayment of a tax voluntarily paid, *i. e.* to pass on such claims for refund." (Italics supplied.)

From this basis, petitioner now contends that notwithstanding the admittedly mandatory duty of the Treasurer to refund voluntary overpayments of income tax, it was the intention of the insular legislature to leave to the Treasurer's discretion the determination of the *right to recover an overpayment and the amount of the overpayment.*

He further contends, in support of the proposition that the Treasurer has the discretionary power of determining whether there has been an overpayment which ought to be refunded, that the Board of Review and Equalization has no power or jurisdiction even to consider questions of overpayments of income tax, and that the jurisdiction of the Board is limited to consideration of questions of deficiency assessments.

Petitioner's "primary question" (Petition, p. 2) as to whether a taxpayer may maintain an action in court against the Treasurer for refund of overpayments of income taxes paid voluntarily and without protest, is really dependent upon his principal contention that the Treasurer, and the Treasurer alone, is authorized to determine whether or not there has been an overpayment. Obviously, if the Treasurer has no such arbitrary power, then the question of the nature of the remedy becomes relatively unimportant, since the

taxpayer may, in default of a remedy by suit in the nature of an action at law, compel the Treasurer to decide his claim on the merits by writ of mandamus.

Points of Argument.

1. The insular Board of Review and Equalization has ample power under the Puerto Rican Income Tax Act of 1924 to determine the correct amount of any income tax owing or thought to be owing by any taxpayer.

2. The Puerto Rican legislature has provided in the insular Income Tax Act an effective remedy by suit in the nature of an action at law for the recovery of overpayments of income taxes, even though made voluntarily and without protest.

3. The decisions of the Supreme Court of Puerto Rico in this case are clearly wrong.

FIRST.

The insular Board of Review and Equalization has ample power under the Puerto Rican Income Tax Act of 1924 to determine the correct amount of any income tax owing or thought to be owing by any taxpayer.

Petitioner's contention that the Board of Review and Equalization has nothing to do with income tax problems, except such as arise in connection with notices of deficiencies (Petition, 24, 28), is entirely unfounded. This point was not mentioned in the opinions of the insular district court, in the opinions of the insular Supreme Court, or in the opinions of Judges Bingham and Wilson of the Circuit Court. It was mentioned for the first time by Judge Morton as one of his grounds for believing that the insular legislature had not granted an effective remedy by suit for the recovery of overpayments. (R., 41, 42).

Petitioner makes no argument as to the point, and seems to assume that the only provisions of law authorizing the Board of Review and Equalization to deal with income tax problems are found in the Income Tax Act of 1924 itself. (Petition, p. 19). This is apparently an oversight, *since it is patent from the basic provisions of Puerto Rican law that one of the prime reasons for constituting the Board of Review and Equalization was to deal with income tax problems of all kinds.*

The present Board of Review and Equalization was constituted by Act No. 75 of the insular legislature, approved August 2, 1923 (Session Laws, pp. 604-610), amending sections 308, 310, and 313 of the Political Code of Puerto Rico. By this act, the jurisdiction of the Board is fixed as follows:

"Section 308.—For the purpose of revising the assessment and reassessment of real and personal property as provided by this Title, *and for the purpose of passing on all claims made by taxpayers in respect to the assessment of their properties and the levying of property and income taxes*, there shall be in the Department of Finance a permanent Board of Review and Equalization with an open office, *to be composed of the Treasurer of Porto Rico* and four persons versed in matters pertaining to the levying of taxes in Porto Rico, two of whom shall be agriculturists. . . .

"Section 310.—Said Board of Review and Equalization shall meet in regular session in the months of January, May and September of each year, and in special session at such other times as may be necessary in the opinion of the chairman. At said meetings the board shall hear appeals received and shall decide questions arising before the board relative to the greater or lesser amount at which property may be assessed for purposes of taxation, or to the amount of taxes, or to exemptions from taxation, *or to fix the income tax of any taxpayer; and upon recording such determination, the board shall correct returns, and liquidate taxes to be levied on income returns filed*, in accordance with its decision, and shall report the facts to the Department of Finance for such corrections, cancellations or issuance of receipts as may

be proper. Said board shall have power to strike out, lessen or increase the valuations made in any schedule returned to it, *whether or not complaint has been made in connection therewith*, and to decide all other complaints in regard to the levying of property and income taxes, and to correct all errors as such errors are brought to its attention. . . ." (*Italics supplied.*)

The approval of the Income Tax Act of 1924 (Act No. 74, approved August 6, 1925) did not deprive the Board of Review of the jurisdiction thus conferred upon it of dealing with all questions respecting income tax which might be presented to it, "whether or not complaint has been made in connection therewith." There is no general repealing clause in the Income Tax Act of 1924; nor are the provisions of the fundamental laws of Puerto Rico, embodied in the codes, repealed by implication. On the contrary, section 67 of the Income Tax Act of 1924 expressly provides:

"Section 67. — All administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act."

Sections 308, 310, and 313 of the Political Code of Puerto Rico, so amended, form part of Title IX of the Code, which bears the title "Revenues," and are included in chapter I thereof, entitled "Assessment of Property." Prior to the amendment of 1923, there was no reference in the sections creating the Board of Review to any jurisdiction over income tax problems. It seems clearly to have been the intent of the Legislature of Puerto Rico to adapt income taxes into the general plan of the Political Code for the collection of taxes, insofar as applicable, and there can be no reason for assuming that the Board of Review was by implication divested of any of its broad, general powers over income tax questions.

If the Board of Review and Equalization has the power, as it obviously does, "to fix the income tax of any taxpayer," petitioner's argument that the insular legislature intended to give the Treasurer, and only the Treasurer, a

discretionary power to determine that same fact is plainly groundless, and petitioner's entire objection to the judgment of the Circuit Court becomes one of determining what sort of remedy the legislature intended the taxpayer to have.

There was no need for taxpayer in this case to allege the grounds upon which the Board of Review and Equalization acted in determining that there had been an overpayment. At most, petitioner's objection on this point is an argument that the complaint does not state facts sufficient to constitute a cause of action. The insular district court, as we have pointed out, did not pass upon that ground of demurrer to the complaint, but rested its decision upon the ground that it had no jurisdiction, nor was the point urged or considered either in the insular Supreme Court or in the Circuit Court of Appeals. It was in Judge Morton's opinion (R., 42, 43) that a suggestion was for the first time made that the complaint was insufficient through failure to state the grounds upon which the Board of Review and Equalization acted.

This objection is, we submit, unfounded, since the Board of Review and Equalization was plainly competent to make the decision which it did, and any objections which the Treasurer may have to its decision ought to be set up by way of answer. *In any event, taxpayer has had no opportunity to meet this objection, even if valid, by amendment of its complaint.*

SECOND.

The Puerto Rican legislature has provided in the insular income tax act an effective remedy by suit in the nature of an action at law for the recovery of overpayments of income taxes, even though made voluntarily and without protest.

Petitioner contends in Point I of his brief (Petition, 23) that the insular legislature was under no obligation to provide a recourse to the courts from the Treasurer's "deter-

mination" of "the correct amount of the tax." This is, of course, conceded.

However, in support of this proposition, petitioner cites *Dismuke v. United States*, 297 U. S. 167, omitting from the quotation on page 23 of petitioner's brief, the succinct definition of this Court as to what language is necessary to deprive one of recourse to the courts:

"But, in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer."

After using the language quoted on page 23 of petitioner's brief, including the omitted part to which we have just referred, the opinion of this Court continues:

"If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence (citing cases), or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized (citing cases). But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. (Citing cases.)"

"The Commissioner is required by § 13, 'upon receipt of satisfactory evidence' of the character specified 'to adjudicate the claim.' This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it."

There is no "compelling language" in the Income Tax Act of 1924 denying taxpayers a right of recourse to the courts. On the contrary, there is mandatory language re-

quiring the Treasurer of Puerto Rico, to examine returns, to determine the correct amount of the tax, and to credit or refund any overpayment (Sections 54, 55, 64). Such language can indicate no intention on the part of the legislature to leave it entirely within the discretion of the Treasurer, or of the Board of Review and Equalization, or of any other administrative officer or body, to determine in his or its discretion whether there has been an overpayment of income taxes.

Dismuke v. United States, supra;
United States v. Laughlin, 249 U. S. 440.

The disputed provisions of the Income Tax Act in question are found in section 76 of the Act, which reads as follows:

"Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Puerto Rico.

"Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence and the hearing shall be set promptly for final decision.

"If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case sufficient legal grounds and facts for applying again to the Board for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of

Puerto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

“(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.”

“(c) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.”

Each of the Judges of the Circuit Court is in agreement that sub-section (a) of this section should be read in connection with section 57 of the Income Tax Act; that is, as stated by Judge Morton in his dissenting opinion (R., 41):

“I agree with my brother Bingham that section 76 (a) relates only to deficiency assessments and payments, and is of no assistance.”

Petitioner seems now to be in agreement with this interpretation of the statute, stating (Petition, 26):

“It is agreed on all hands that section 76 (a) relates only to deficiency taxes: • • •”

The question therefore resolves itself into one of determining what, if anything, the Legislature of Puerto Rico meant when it included section 76 (b) in the Income Tax Act of 1924.

In Point II of his brief petitioner analyzes section 76 (b) and contends that it does not constitute an affirmative grant of authority to taxpayers to bring suit in case of a denial of a claim for credit or refund, but rather that such authority

can be derived from section 76 (b) only by inference, or, as petitioner has characterized the sub-section, it is merely a "negative pregnant," since it provides only that

"No suit or proceeding shall be maintained in any court for the recovery of any income tax . . . alleged to have been erroneously or illegally assessed or collected . . . *until* a claim for credit or refund has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal according to the provisions of law in that regard and the regulations established in pursuance thereof." (Italics supplied.)

In other words, petitioner's contention is that since the section provides only that no suit may be brought *until* certain preliminary steps are taken, it is not to be understood that such suits may be brought if those steps are taken! The argument speaks for itself.

Petitioner further argues (Petition, 25) that it was the intention of the Legislature in enacting section 76 (b) to refer to other provisions of law which do expressly permit recourse to the courts, or appeal to the Board of Review and Equalization, apparently following Judge Morton's argument (R., 41) in which he states with respect to section 76 (b):

"The reference to suits in court and to appeals to the Board of Review although in the negative form might possibly have been construed as conferring by implication the jurisdiction now held to exist in the Board of Review and in the Courts if these references had not been limited as they are very expressly by the last clause in the sub-section. *It seems clear that provisions assumed to be in the statute are absent.* My brethren elaborate 76 (b) to include by construction what they suppose the omitted provisions to have been." (Italics supplied.)

There are, however, no such "omitted provisions." Section 64 (b) of the statute plainly provides for the filing of claims for credit or refund with the Treasurer, and, as we have pointed out, sections 308 and 310 of the Political

Code cover adequately the right of the taxpayer to appeal from a denial of such a claim for credit or refund to the Board of Review and Equalization. It can scarcely, therefore, be said that sub-section (b) of section 76 is an unfinished piece of legislation because of the limitation requiring the filing of a claim for credit or refund "and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

The only alternative to the decision of the majority of the Circuit Court is to discard entirely, as meaningless, the entire sub-section (b) of section 76. This, of course, violates a cardinal principle of statutory construction.

D. Ginsberg & Sons v. Popkin, 285 U. S. 204, 76 L. ed. 704.

Under the scheme of the statute, which is now clear and admitted, but which the Supreme Court of Puerto Rico entirely failed to appreciate, section 76 (b) must refer to this very case. It is conceded that when the Treasurer determines that a taxpayer has *underpaid* his tax, he must give the taxpayer notice of his determination of a deficiency by registered mail (section 57), and the taxpayer is allowed 30 days within which to appeal to the Board of Review and Equalization. The decision of the Board of Review and Equalization is final; the tax is assessed, and the taxpayer may pay under protest and file suit to recover within 30 days after payment. Section 76 (b) has no application to this situation. In the case of underpayment no claim for credit or refund need be filed, and no further appeal to the Board need be taken.

If the taxpayer *overpays* his tax, it is conceded that the Treasurer has a mandatory duty to refund or credit the amount of the overpayment, provided a claim for credit or refund is filed within four years of the date of payment (Section 64 (b)). If section 76 (b) does not apply to this situation, it is mere surplusage, *since no claim for credit*

refund is provided for except in the case of overpayments. What object could the legislature have had in providing that no suit could be brought unless certain conditions were fulfilled if it did not intend that such a suit could be brought if the conditions were fulfilled? The Treasurer of Puerto Rico has always so construed the Act. Under the authority given him under section 68 of the Act the petitioner's predecessor in office issued and published on May 17, 1926 regulations which are still in force with respect to the remedies granted by the Act to taxpayers. The pertinent provisions are as follows:

"Article 355.—Suits for Recovery of Taxes Erroneously Collected.—Suit or proceeding for the recovery of any income or excess-profits taxes alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected can be maintained by the taxpayer when the requirements of either of the following methods of procedure have been fulfilled:

"(1) When the taxpayer receives notice from the Treasurer that the income tax has been determined, he may: (a) make a voluntary payment of the amount so determined (without filing an appeal from the Treasurer's determination of the tax to the Board of Review and Equalization); (b) file a claim for refund or credit with the Treasurer within four years from the time the tax was paid (see section 64 (b)); (c) if the claim is denied by the Treasurer, the taxpayer may bring an ordinary action before a court of competent jurisdiction to recover the amount so paid.

"(2) When the taxpayer receives notice of the determination by the Treasurer of the tax to be paid, he may: (a) file an appeal to the Board of Review and Equalization; (b) if the decision is adverse he may petition for a reconsideration within thirty days; (c) if the reconsideration is denied, he may pay under protest; (d) if payment has been made, he may file a claim for credit or refund with the Treasurer and

with the Board of Review and Equalization; (e) within thirty days from the date of payment he may file a suit in the proper court to recover the amount paid under protest. See section 76 (a) and (b).

"The preceding paragraphs of this article outline the only manner in which a suit may be brought by the taxpayer for the recovery of taxes erroneously or illegally assessed or collected, or penalties collected without authority, or any sums excessive or in any manner erroneously collected, and strict compliance with these provisions by any taxpayer bringing such suit or proceeding is required. No suit for the purpose of restraining the assessment or collection of any taxes shall be maintained in any court. The word 'restraining' is used in its broad, popular sense of hindering or impeding, as well as prohibiting or staying, and the provision is not limited in its application to suits for injunctive relief. The prohibition of such suits can not be waived by any officer of the Government.

"Section 76 does not affect any proceeding in court instituted prior to the enactment of the Act."

This article of the Treasurer's regulations has never been revoked, and has for many years been relied on by taxpayers and their counsel.

Regulations promulgated by an officer charged with the duty of enforcing a statute are at least entitled to great respect and ought not to be overruled without cogent and persuasive reasons.

La Roque v. U. S., 239 U. S. 62, 60 L. ed. 147;
U. S. v. Morehead, 243 U. S. 607, 61 L. ed. 926;
Tyson v. Commissioner, 68 F. (2d) 584.

There is in this case an even stronger reason for holding that the Treasurer's regulations may not be ignored. Section 76 of the insular Income Tax Act was re-enacted by the Legislature of Puerto Rico by Act No. 102, approved May 14, 1936. The only amendment was to add a proviso to sub-section (a) limiting the number of petitions for recon-

sider
view
section
Treas

Pe
were
and n
either
has a
are e
Court
regula
for re
article
know
such
author
again
the v

T
in th

P
decis
local
error

T
catio
the C
Supr
T
due t

tion which might be considered by the Board of Re-
and Equalization. *The effect of this re-enactment of
on 76 was to confirm the regulations adopted by the
surer pursuant to and explanatory of that section.*

Brewster v. Gage, 280 U. S. 327, 74 L. ed. 457.

petitioner states (Petition, 16) that these regulations
"not pleaded, nor otherwise appearing in the record,
not mentioned in the opinions of the insular courts,
the District Court or the Supreme Court." Petitioner
apparently overlooked the fact that these regulations
expressly mentioned in the judgment of the District
Court (R., 16), and that the portions of article 355 of the
regulations applicable to this case are quoted in the motion
for reconsideration filed in the District Court (R., 15). The
case was discussed at length in the Circuit Court. We
find of no principle of law, nor does petitioner cite any
principle, requiring regulations duly published under
authority of statute to be pleaded, *particularly in an action
against the officer whose predecessor in office promulgated
the regulations in question.*

THIRD.

*The decisions of the Supreme Court of Puerto Rico
in this case are clearly wrong.*

Petitioner cites authorities for the proposition that a
decision of the Supreme Court of Puerto Rico, construing a
statute of Puerto Rico, will be followed unless "clearly
erroneous."

The general rule is not questioned. However, the appli-
cation of the rule has never been carried to the point where
the Circuit Court of Appeals is expected blindly to follow the
decision of the Supreme Court of Puerto Rico.

There has been a great deal of confusion in Puerto Rico
because of conflicting and inconsistent decisions of the Supreme

Court of Puerto Rico in construing income tax legislation. Judge Wilson states (R., 37):

... "The Legislature by the Act of 1925 attempted to clarify certain provisions of the prior Acts.

"However, the procedure under the Income Tax Act of 1919, 1921 and 1925 has been so confused by the decisions of the Supreme Court of Puerto Rico that, while ordinarily this Court will follow the interpretation of the law of Puerto Rico by the Insular Supreme Court, we think we are warranted in determining, without regard to the many conflicting decisions of the Insular Supreme Court, what seems to us to be the intent of the Insular Legislature in the passage of Act 74 of the Laws of 1925 so far as it affects the decision of these cases."

Fully to understand the error into which the Supreme Court of Puerto Rico has fallen it is necessary to review the history of income tax legislation in Puerto Rico.

Under the Income Tax Act of 1919, the Supreme Court of Puerto Rico held in *Serrallés v. Treasurer*, 30 P. R. R. 220, that a taxpayer might recover overpayments of income tax *even though the taxpayer had not paid under protest and even though the Treasurer of Puerto Rico had denied his claim*. The sole statutory authority for such a decision in this case was section 66 of the 1919 Act which provided:

"That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.

"That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act."

The next income tax act, that of 1921, suppressed all the provisions of the 1919 act authorizing refund or credit of overpayments, and under that law it was apparent that a taxpayer had no remedy either from the Treasurer or through the courts.

The succeeding act, that of 1924, and the one here in question, reinstated the duty of the Treasurer to credit or refund overpayments and provided that a taxpayer may file a claim for credit or refund within four years. The mandatory nature of the Treasurer's duty to refund is considerably clearer than in the 1919 Act. (Compare section 66 of the 1919 Act with sections 54, 55, 64 of the 1924 Act.)

After the 1924 Act became effective the Supreme Court of Puerto Rico held in *Compañía Agrícola de Cayey, Ltd. v. Domenech*, 48 D. P. R. (Spanish edition) 535 (a case involving \$352.57 and therefore not appealable to the Circuit Court of Appeals), that although the 1924 Act provided for credit or refund and authorized the taxpayer to file a claim for credit or refund, the legislature had not seen fit to revive the right to sue *because the second paragraph of section 66 of the 1919 Act above quoted, had been omitted*. The Court gave no consideration to the fact that section 76 (b) of the 1924 Act was an entirely new provision which had not appeared in the 1919 Act at all, and was obviously intended to fill the place of the second paragraph of section 66 of the 1919 Act; nor did the Court give any consideration to the fact that the Treasurer of Puerto Rico had by his regulations for many years (see Art. 355, *supra*) construed section 76 (b) as granting a right to sue to recover voluntary overpayments.

What the legislature did when it adopted the 1924 Act is clear. Instead of following the wording of section 66 of the 1919 Act, the corresponding section 75 of the 1924 Act follows the wording of section 3220 of the U. S. Revised Statutes. Instead of following this with the second paragraph of section 66 of the 1919 Act, the 1924 Act accomplishes the same purpose in section 76 (b) of the 1924 Act by use of the language of section 3226 of the U. S. Revised Statutes.

The fundamental error into which the insular Supreme Court fell in the case of *Compañía Agrícola de Cayey v. Domenech, supra*, in this case, and in the case of *Porto Rico Fertilizer Company v. Domenech, supra*, was to fail to appreciate the sharp distinction which the legislature had drawn in the 1924 Act between the method for recovery of amounts paid under deficiency assessments, and those paid voluntarily by the taxpayer on the basis of his own return and calculations. This is apparent from a reading of the decision in the *Porto Rico Fertilizer Case, infra*, p. 29. What the Court there says is entirely applicable to the recovery of amounts paid under *deficiency assessment*, and had no bearing whatever on the situation there before the court. The court fails even to discuss the intent of the legislature in including section 76 (b) in the 1924 Act, or to advise taxpayers why the regulations of the Treasurer cannot be relied upon.

The language of the Court as to protest arises out of the same basic error. Having decided that section 76 (a) was the only portion of the statute granting a right to sue, and that section 76 (b) was merely a meaningless duplicity which ought to be discarded entirely, the Court said (R., 23):

"We can realize that it would have been difficult or almost impossible at the time of payment of the taxes for it to know that it was paying the same in excess of the amount due. It is necessarily true that when a taxpayer makes a voluntary payment he is ordinarily not conscious that such a payment is an excessive one. . . .

"*By legislative enactment* a payment under protest is a condition precedent to recovery by suit." (Italics supplied.)

It seems apparent that the only "legislative enactment" which the Court had in mind was section 76 (a), which clearly has no bearing on this case.

This is not the only case with respect to income tax procedure in which the insular Supreme Court has had difficulty.

The Court had previously held that Act No. 8 of 1927 (Session Laws, p. 122), a general statute providing for payment of taxes under protest and permitting suit against the Treasurer of Puerto Rico, had modified the income tax act by permitting taxpayers to file suit within one year instead of 30 days as provided in section 76 (a) of the Income Tax Act of 1924. In *Domenech v. Verges*, 69 F. (2d) 714, the Circuit Court of Appeals recognized with obvious reluctance that the decision of the insular Supreme Court was not clearly wrong. The Supreme Court then, in the *Porto Rico Fertilizer Case*, *infra*, reversed itself, in spite of the fact that its previous decision had stood unchallenged and even approved by the Circuit Court for five years, stating:

"We realize the difficult situation, but a careful and thorough study of the question compels us to decide it differently from our decision in the said case of American Colonial Bank, *supra*, affirmed, but which was not really relied on with all its consequences in the other case of Soto Gras, *supra*, since the jurisdictional ruling established in the special law and not that of the general law was finally applied."

This lack of consistency in the decisions of the Supreme Court of Puerto Rico has been disastrous for the taxpayer. When the Supreme Court held that a taxpayer might bring suit within one year after payment, and this was recognized by the Circuit Court of Appeals, taxpayers who relied on this decision have been irreparably prejudiced by the subsequent decision of the Supreme Court expressly reversing itself and holding that suit must be brought within 30 days as provided in the Income Tax Act and not within one year as provided in the general law. Recovery was actually denied in *Méndez Hnos. v. Treasurer*, 51 P. R. R. 147 (Spanish edition) on this sole ground. Unfortunately, the amount involved was only \$1,941.03, and the case hence unappealable.

We point this out only to demonstrate to this Court the utter confusion in which the decisions of the insular courts

have fallen with respect to recovery of income tax payments. If there were no other considerations, the fact that in the same decisions the insular Supreme Court has so obviously confused the meaning of subsection (a) and subsection (b) of section 76 of the Income Tax Act of 1924 ought not to be lightly passed over. We are not, of course, contending that the time within which to bring suit is in any way involved in this case.

The decision of the Supreme Court of Puerto Rico in this case is, we submit, not only clearly wrong, but the inconsistency and confusion in the decisions of the insular Supreme Court warranted the Circuit Court of Appeals in considering the entire situation and in determining for itself on the basis of a fair construction of the Income Tax Act of 1924 what rights and remedies the Legislature of Puerto Rico intended for taxpayers to have. The Circuit Court would not, we submit, have been justified in ignoring the plain error into which the Supreme Court has fallen not only in this but in many other cases.

CONCLUSION.

No question of public policy is involved in this petition for writ of certiorari. The decision of the majority of the Circuit Court is in harmony with the applicable decisions of this Court. The Supreme Court of Puerto Rico was clearly in error, and the interpretation placed upon the statute in question by the majority of the Circuit Court is correct, fair, and clear.

The petition for writ of certiorari should be denied.

Respectfully submitted,

EARLE T. FIDDLER,
Attorney for Respondent.

H. S. McCONNELL,
on the Brief.

San Juan, Puerto Rico,
January 10, 1939.

APPENDIX A.

Sections 61 and 63 of the Income Tax Act of 1919, Act No. 80, approved June 26, 1919.

Section 61.—That where the Treasurer dismisses a petition for reconsideration, or where he modifies his first decision though not in terms prayed for by the taxpayer, such taxpayer may, within fifteen days following the notification of such decision, appeal to the Board of Review and Equalization created by law, alleging in writing and under oath the facts upon which he bases his claim and the reasons of law in support thereof.

Section 63.—That the decisions of the Board of Review and Equalization shall be final. In such cases the taxpayer shall pay the tax imposed upon him, within the time fixed in Section 55, under protest, and he may interpose within ten days following such payment under protest, a sworn complaint against the Treasurer of Porto Rico and before a court of competent jurisdiction. Said cases shall be given preference and priority on the calendars of the courts, and all defenses against the complaint to be offered by the defendant shall be made at one time and in one bill, and the judge shall decide then (*sic*) at one sole hearing in strict order of precedence. The trial shall be promptly set for final decision and any unwarranted delay on the part of the plaintiff shall be sufficient grounds for a judgment of dismissal.

Sections 45, 46, and 47 of the Income Tax Act of 1921, Act No. 43, approved July 1, 1921.

Section 45.—When a return made by a taxpayer is modified by the Treasurer of Porto Rico, and such taxpayer does not concur in said officers' decision, such taxpayer may appeal to the Board of Equalization and Review created by law, within the fifteen days following service of notice of said decision, whether the same is served by an agent or by

mail, alleging in writing, under oath, the facts on which the claim is based and the legal principles adduced in its support.

Section 46.—That the Board of Review and Equalization shall fix the day and hour for the hearing of the case, at which hearing evidence shall be introduced and the argument of the appellant shall be heard. All powers vested under this Act in the Treasurer to summon witnesses, require the production of books and documents, strike balances and take inventories, and make investigations, are hereby conferred upon the Board of Review as to such cases as may be submitted thereto for its consideration.

Section 47.—That the decisions of the Board of Review and Equalization shall be final. The taxpayer shall pay the tax imposed upon him, within the time fixed, under protest, and he may interpose within twenty days following such payment under protest, a proper complaint against the Treasurer of Porto Rico and before the proper district court. Said cases shall be given preference and priority in the calendars of the courts, and all defenses against the complaint to be offered by the defendant shall be made at one time and in one bill, and the judge shall decide then (*sic*) at one sole hearing in strict order of precedence. The trial shall be promptly set for final decision and any unwarranted delay on the part of the plaintiff shall constitute sufficient ground for a judgment of dismissal.

APPENDIX B.

Opinions of the Supreme Court of Puerto Rico in the case of Porto Rico Fertilizer Company v. Domenech:

OPINION OF SUPREME COURT OF PUERTO RICO

Delivered by Associate Justice,

MR. ALDREY.

San Juan, Puerto Rico, November 13, 1935.

Porto Rico Fertilizer Company, a domestic corporation, paid without protest to the Treasurer of Puerto Rico, in the years 1926, 1927, 1928, 1929, 1930, 1931 and 1932, the taxes collected from it as withholding agent of the Virginia-Carolina Chemical Corporation, a corporation of the United States of America. The payment made in 1929 was so made on the 11th of June of said year. On the 4th of October 1933 Porto Rico Fertilizer Company petitioned the Treasurer of Puerto Rico for the refund of all said taxes because the same had been erroneously collected and paid, alleging that, while from 1924 to 1931 it borrowed money from the Virginia-Carolina Chemical Corporation, all said loans were made in Richmond, State of Virginia, where the money was spent and interest paid on the loans with money that the Porto Rico Fertilizer Company had on deposit with banks in New York, and that the Virginia-Carolina Chemical Corporation has not even had an agent in this island nor a representative or office therein. The Treasurer refused the refunds requested as regards the payments made up to the 11th of June 1929 for the reason that four years had elapsed since said payments were made. He also refused the refund of the taxes paid after said date. Against said decisions of the Treasurer of Porto Rico Fertilizer Company filed suit in the San Juan District Court praying that the Treasurer be ordered to return all the said taxes, alleging the facts hereinbefore set forth. Two payments were made in 1926 and in the complaint there are alleged eight causes of action,

one for each payment made. Said complaint was demurred to on the ground that it did not allege facts sufficient to constitute a cause of action, and the court sustained said demurrer of the defendant because the claim made for the payments to which the first five causes of action refer has been made after more than four years had elapsed. Regarding the payments made after the 11th of June, 1929, which are the payments to which the last three causes of action refer, the court held that it could not order the refund thereof because the payments were not made under protest and because Porto Rico Fertilizer Company should have appealed from the refusal of the Treasurer to return said taxes to the Board of Review and Equalization before it could resort to the courts of justice. Judgment was entered in conformity with said decision and plaintiff took this appeal.

In the brief filed in this court plaintiff acknowledges that the first five causes of action have prescribed, wherefore it limits its argument on appeal to the contention that the judgment is erroneous as to the last three causes of action, alleging that it does not have to make the payments under protest nor to appeal from the Treasurer's decision to the Board of Review and Equalization.

Law No. 74 of 1925, which is an income tax law, in force at the time the payments the subject of this appeal were made, in its Section 75 empowers the Treasurer to remit, reimburse and refund any taxes which appear to have been erroneously assessed or for an excessive amount or in any manner erroneously collected, charging him with the duty of reporting to the Legislature, at the inception of each ordinary session, all the transactions authorized in said section.

The said law, in its Section 76 and under the title "Limitations upon suits and Proceedings by the Taxpayer", provides in its subdivision (a) that the decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law, and that the taxpayer shall pay under protest such tax as

shall have been levied on him, within the time specified and within thirty days subsequent to such payment under protest may bring proper suit in a proper court, against the Treasurer of Puerto Rico. Said term of thirty days was extended to one year by law No. 8 of 1927. Subdivision (b) of said Section 76 provides that no suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof. The meaning of said subdivisions is that the income tax should be paid under protest before refund can be obtained, and that the suit against the Treasurer should be filed within a year, but that said proceeding shall not be maintained in any court unless, after payment under protest, a claim for refund shall have been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, before or after said period of one year. We have already stated that in the instant case the payment was not made under protest, as it should have been made.

On the other hand, it was necessary that appellant file an appeal with the Board of Review and Equalization from the decision of the Treasurer refusing the refund prayed for. The words of the law regarding appeal before the Board of Review and Equalization are sufficiently explicit to warrant the conclusion that they granted an appeal before the Board. Such an appeal was not taken.

For the reason that the payment was not made under protest and no appeal was taken to the Board of Review and Equalization, the judgment appealed from should be affirmed.

PEDRO DE ALDREY,
Associate Justice.

OPINION OF SUPREME COURT OF PUERTO RICO.

DELIVERED BY MR. CHIEF JUSTICE
DEL TOBO.

San Juan, Puerto Rico, July 23, 1936.

This is a suit for the recovery of taxes. Plaintiff, a corporation organized in accordance with the laws of this island, alleges that during the years 1924 to 1931 it borrowed certain amounts of money from the Virginia-Carolina Chemical Corporation, a Virginia corporation having no agent in this island; that the loans were contracted for and the money paid in Richmond, Virginia, and used outside of Puerto Rico in the purchase of materials used by plaintiff in its business, and that the principal as well as interest on said loans were paid in Richmond by means of drafts against funds deposited in New York.

Plaintiff then sets forth eight separate causes of action. The first one, copied literally, reads:

"6. That on May 20, 1926 plaintiff was notified by the Treasurer of Puerto Rico that said official had assessed in the sum of \$786.29 the amount of income tax payable by the Virginia-Carolina Chemical Corporation for interest paid to said corporation by plaintiff during the period of time from July to December, 1924, by virtue of the loans described in paragraph second of this complaint, notifying this plaintiff at the same time that it should pay said amount as withholding agent of the said Virginia-Carolina Chemical Corporation, and plaintiff alleges that on the 19th of June, 1926 it paid said sum of \$786.29 to the Treasurer of Puerto Rico for the aforesaid taxes."

The remaining causes of action refer to the years 1925, 1926, 1927, 1928, 1929, 1930 and 1931, payments having been made respectively in 1926, 1927, 1928, 1929, 1930, 1931 and 1932.

Plaintiff further alleges that for the reason that neither the Virginia-Carolina Chemical Corporation nor the loans

in question ever had a situs in Puerto Rico, the collection of the tax on income earned and received outside of Puerto Rico was illegal; that in accordance with Section 75 of Law No. 74 of 1925 the Treasurer of Puerto Rico is authorized to return said taxes, and that on October 3, 1933, plaintiff asked the Treasurer for the return of said taxes and the Treasurer on the following day refused said petition as regards the payments referred to in the first, second, third, fourth and fifth causes of action, basing said refusal on subdivision (b) of Section 64 of said Law No. 74 of 1925, and on the 30th of the said month of October, 1933 he denied said petition also with regard to the payments referred to in the sixth, seventh and eighth causes of action.

Plaintiff prayed for judgment ordering the refund of the said taxes with interest from the date they were paid.

Defendant demurred to the complaint alleging lack of facts to constitute a cause of action, and the court sustained said demurrer granting plaintiff leave to amend its complaint.

Plaintiff petitioned for a reconsideration and judgment on the pleadings in case the reconsideration were denied. The District Court affirmed its original opinion and rendered judgment dismissing the complaint. And it is against this judgment that this appeal was taken. The assignment of errors, copied literally, reads as follows:

"1. That the District Court erred in deciding that the complaint does not state facts sufficient to constitute a cause of action.

"2. That the San Juan District Court erred in deciding that plaintiff should have appealed to the Board of Review and Equalization before making payment of the amounts claimed, and/or that said plaintiff should have paid said taxes under protest, and in deciding that because it did not do so said plaintiff has no cause of action.

"3. That the San Juan District Court erred in deciding that plaintiff should have appealed to the Board of Review and Equalization from the refusals of the Treasurer of October 4 and 30, 1933, with

regard to the claim for refund filed by plaintiff with said official, and in deciding that because said appeals were not instituted plaintiff has no cause of action."

In its brief plaintiff-appellant admits that its first five causes of action have prescribed and confines itself to arguing its case as to the sixth, seventh and eighth causes of action. The Treasurer filed his brief and after hearing the case the appeal was decided by this court on November 13, 1935, affirming the judgment appealed from.

In the opinion on which the judgment is based the court stated in part as follows:

"Law No. 74 of 1925, which is an income tax law, in force at the time the payments the subject of this appeal were made, in its Section 75 empowers the Treasurer to remit, reimburse and refund any taxes which appear to have been erroneously assessed or for an excessive amount or in any manner erroneously collected, charging him with the duty of reporting to the Legislature, at the inception of each ordinary session, all the transactions authorized in said section. The said law, in its Section 76 and under the title 'Limitations upon suits and Proceedings by the Taxpayer', provides in its subdivision (a) that the decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law, and that the taxpayer shall pay under protest such tax as shall have been levied on him, within the time specified and within thirty days subsequent to such payment under protest may bring proper suit in a proper court, against the Treasurer of Puerto Rico. Said term of thirty days was extended to one year by Law No. 8 of 1927. Subdivision (b) of said Section 76 provides that no suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and

the regulations established in pursuance thereof. The meaning of said subdivisions is that the income tax should be paid under protest before refund can be obtained, and that the suit against the Treasurer should be filed within a year, but that said proceeding shall not be maintained in any court unless, after payment under protest, a claim for refund shall have been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, before or after said period of one year. We have already stated that in the instant case the payment was not made under protest, as it should have been made. On the other hand, it was necessary that appellant file an appeal with the Board of Review and Equalization from the decision of the Treasurer refusing the refund prayed for. The words of the law regarding appeal before the Board of Review and Equalization are sufficiently explicit to warrant the conclusion that they granted an appeal before the Board. Such an appeal was not taken.

For the reason that the payment was not made under protest and no appeal was taken to the Board of Review and Equalization, the judgment appealed from should be affirmed."

For the reasons set forth plaintiff requested this court to modify "the opinion rendered in this case sustaining that the doctrine established in the cases of *American Colonial Bank of Porto Rico v. Gallardo* and *Soto Gras v. Domenech* has not been modified in any manner; conforming the opinion and judgment in this case with the doctrine established in the aforesaid cases, or making the corresponding distinction, if possible, between the doctrine established in this case and the doctrine established in said other cases, for the purpose of avoiding serious confusion regarding the construction of the law and the authorities applicable and to prevent serious confusion regarding the construction of the law and the authorities applicable and to prevent serious injury to taxpayers who up to this date have acted and proceeded in good faith for the protection and defense of their rights in accordance with the decisions of this court in the aforementioned cases."

By order of January 14th last the court reconsidered its judgment of November 13, 1935, and set a new hearing for February 18, 1936. Both parties maintained their respective positions and Mariano Acoste Velarde, Esq., intervened in the case as *amicus curiae*, alleging, in fact, that in Puerto Rico "the payer of income taxes has the right, arising under Law No. 74 of 1925 and its regulations, to obtain the refund of what is unduly paid, within four years after income taxes are erroneously paid, by means of a claim for refund and the proper judicial action, even if the payment was not made under protest."

The ultimate facts to be considered for the decision of this appeal are, therefore, that plaintiff, on October 3, 1933, filed with the defendant Treasurer three claims for refund of income taxes that it had paid without protest in 1930, 1931 and 1932; that the Treasurer denied said claims on October 30, 1933 and on November 3, 1933, plaintiff appealed from said denial to the District Court of San Juan.

This being so, since the taxes paid correspond to and the payments thereof were made after the year 1925, the case is governed by Law No. 74 of 1925.

Section 75 of said law authorizes the Treasurer to remit, refund and return any taxes erroneously or illegally assessed or collected and penalties collected without authority, and any tax that appears to have been unjustly levied or for an excessive amount or for any reason erroneously collected.

The authorization cannot, in fact, be more ample. The Treasurer acts by himself. He is called upon to judge the merits of each claim. By said Section 75 he is only charged with the duty of rendering a report to the Legislature of Puerto Rico, at the inception of each regular session, of all the transactions carried to effect by him in the exercise of said authorization.

The taxpayer is called upon to render his income tax return and, as soon as practicable after the filing of said return, the Treasurer of Puerto Rico shall examine the same and determine the exact amount of the tax.

If the taxpayer declares no taxable amount, or if he does not file a return, the deficiency shall be the excess of the tax over the amounts previously assessed. When he so determines, the Treasurer shall notify the taxpayer and the latter, within thirty days from the date that the notice is deposited in the postoffice, may file an appeal with the Board of Review and Equalization stating the facts and grounds of his claim, in writing and under oath.

If the Board decides in favor of the taxpayer he shall not be liable for any part of the deficiency determined by the Treasurer and disallowed by the Board, and the Treasurer shall have the right, within the term of one year, to institute an action in a district court of competent jurisdiction, without assessment, for the collection of any part of the amount so disallowed. Of course, in such an action the taxpayer shall have the opportunity to defend himself, and judgment shall be rendered in accordance with the facts and the law.

The foregoing is more clearly provided by Sections 54, 56 and 57 of the law. See also Sections 62 and 64.

Section 76 (a) provides that the decisions of the Board shall be final and the taxpayer shall pay the tax under protest if he wishes to resort to the courts of justice.

Section 76 further provides that any actions so instituted by taxpayers shall have preference in the dockets of the courts, and the defendant shall set forth all his defenses at once and in one single writing and the case shall be promptly set and decided in one hearing.

Said section goes on to provide about the reconsideration by the said Board, and then commands that:

“(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treas-

urer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

Does this subdivision (b) mean that after the Treasurer denies the claim and said denial is affirmed by the Board a claim for refund has to be filed and if the Treasurer refuses it appeal again to the Board in order to be able to resort to the courts of justice?

Such is the meaning, at first glance, of the terms of the law itself, and we so decided in the opinion rendered as grounds for the judgment which was made ineffective by the order of January 14th last.

Nevertheless, a careful consideration of the matter carries us to the conclusion that it is not possible that such was the intent of the legislator. Why such duplicity? If the Treasurer denies and the Board affirms his denial and the taxpayer pays under protest, why resort again to the Treasurer and why appeal again to the Board?

This court had already said in the case of *American Colonial Bank of Porto Rico v. Domenech, Treasurer*, 43 D. R. R. 889, 891. "We also agree with appellant that, if after appealing to the Board of Review and Equalization a taxpayer pays under protest, it is not necessary, once payment is made, to resort to said Board. The legislative intent was to grant a cause of action after payment under protest. Nevertheless, when drafting the said opinion in this case, our previous opinions were overlooked and when our attention was called to that oversight a reconsideration was granted and the case was reopened for a new discussion and decision of the issues of the same."

It is therefore clear that when the taxpayer, feeling aggrieved by the income tax levied by the Treasurer, files his claim with said official and his claim is denied and he appeals to the Board, which also decides the case against him, and he then pays under protest, he may, within the term of thirty days fixed by Law No. 74 of 1925, Section 76, first paragraph, resort to the courts of justice without any other

preliminary requisite, that is, without having to file a petition for refund with the Treasurer and without having to appeal again to the Board of Review and Equalization.

As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of justice without paying under protest. If said taxpayer feels aggrieved by the tax assessed, he may, within thirty days after being notified, appeal to the Board and obtain that said Board overrule the deficiency determined by the Treasurer, as provided in Section 57 of said law, and he may, if the decision of the Board is against him, pay under protest and, within thirty days after payment, resort to the courts of justice availing himself of the right granted by Section 76 of the said law of 1925. He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice.

The non-existence of the appeal to the courts when payment is not made under protest is a matter already decided by this court in the case of *Compañía Agrícola de Cayey v. Domenech, Treas.*, 47 D. P. R. 535, 539, as follows:

“It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by means of law suit also disappeared. From 1921 on the payment under protest was an express condition preliminary to the initiation of a law suit. Though the law of 1921, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the refund of the taxes could be obtained. And such was the general understanding. We have before us an illustrative chart prepared by the Economic Commission of the Legislature containing the laws now in force, and the law of 1919 is

omitted therefrom. Generally, though the time elapsed is not so long, taking into consideration the contemporary construction, the law of 1919 is no longer in force. Therefore, though the law of 1925 granted the substantive right of filing appeal with the Treasurer even if the taxes were not paid under protest, said law did not keep in force or revive the remedy granted by the law of 1919."

The decisions in *Serrallés v. Treasurer*, 30 P. R. R. 220, and *McCormick v. Bonner*, 44 D. P. R. 432, cited by the amicus curiae, are not applicable because they are based on the repealed law of 1919.

Therefore, under any phase that the case is considered, the judgment appealed from should be affirmed.

We would consider this opinion terminated if the question had not been brought up and discussed amply as to the influence that the decisions of this court in the cases of *American Colonial Bank v. Domenech, Treas.*, 43 D. P. R. 889, and *Soto Gras v. Domenech, Treasurer*, 45 D. P. R. 940, may and should have in the decision of this case.

The first of said cases has been cited and relied upon on the same question that the taxpayer who has filed a petition with the Treasurer, has appealed to the Board and has paid under protest, is not required to file a petition for refund with the Treasurer and appeal to the Board again before he may resort to the courts of justice. But that is not the question that we should now decide, but the following:

Notwithstanding the fact that this is a case of income taxes, this court decided that, in accordance with Law No. 8 of 1927 providing for payment of taxes under protest, the term within which the taxpayer could file suit was one year, and further said:

"Section 3 of Law No. 8 provided a manner of payment and a right of action which were prospective and excluded previous methods. So that, a previous law providing for the filing of suit within thirty days after the decision of the Board of Review and Equalization was necessarily repealed." *American Colonial Bank v. Domenech*, 43 D. P. R. 890, 891.

Undoubtedly the court referred to subdivision (a) of Section 76 of the Law No. 74 of 1925.

In the second case, that is, the case of *Soto Gras, supra*, this court stated in part as follows :

“After rendering our opinion in the above entitled case, appellant The People of Puerto Rico filed a motion for reconsideration. Said motion was duly heard and is now before us. Inasmuch as other questions have been sufficiently discussed or decided in our original opinion or in other decisions of this Court, the only question that should be considered is whether the San Juan District Court lacked jurisdiction because the amount claimed by plaintiff was less than \$500 and because the suit should have been filed in a municipal court. The Government bases his contention on the fact that Section 76 of Law No. 74 of 1925 (page 401), in accordance with our opinion in the case of *American Colonial Bank v. Treasurer*, 43 D. P. R. 889, has been repealed by Law No. 8 of 1927 (Page 123) as regards payment under protest. In accordance with the law of 1925 it was clear that the taxpayer had to file his complaint in a district court. Nevertheless, if that law was repealed, the general provisions of law were applicable. We will assume for the time being, that up to 1925 a taxpayer had to file his claim for refund of taxes amounting to less than \$500 in a municipal court. Our decision in the case of *American Colonial Bank v. Treasurer, supra*, was that the questions of procedure provided for in the law of 1925 had been abrogated by the law of 1927. We were not dealing with the question of jurisdiction. Therefore, we are inclined to agree with appellee’s contention and with appellant’s suggestion that both laws could co-exist regarding the question of jurisdiction if the later law did not show the intention to grant jurisdiction to a municipal court. If both laws may subsist, then the intention of the legislature of requiring that a taxpayer resort to a district court was perfectly clear in the law of 1926.”

It was insisted that the District Court had jurisdiction. Both decisions were accepted and applied by the Circuit

Court of Appeals for the First Circuit as holding that Section 76 of Law No. 74 of 1925 has been repealed by Law No. 8 of 1927, and in the case of *Domenech v. Verges*, 69 F. (2d) 714, 716, said court stated as follows:

"It is contended by counsel for the appellant that Act No. 8 of the Laws of 1927, providing for the recovery of taxes paid under protest, does not apply to the recovery of income taxes paid under protest; that it was a substitution for a general law enacted prior to the imposition of income taxes; and that, while it expressly repealed Act No. 9, approved June 23, 1924, and also Act No. 84, approved August 20, 1925, which acts provided generally for the recovery of taxes paid under protest, since it did not expressly refer to the Income Tax Act of 1924 approved August 6, 1925, in its repealing section, it should not be construed as repealing or modifying section 76(a) or (b) of that act relating to the recovery of income taxes paid under protest, though it repealed all conflicting laws or parts of laws.

The Supreme Court of Puerto Rico (however, in the case of *American Colonial Bank of Porto Rico v. Juan G. Gallardo*, 43 D. P. R. 889 (Spanish Edition) decided July 26, 1932, and in the case of *F. Soto Gras v. Domenech, Treasurer*, in an opinion handed down December 20, 1933, on a motion for reconsideration), has held that the method of procedure provided for the recovery in section 76 of the Income Tax Act of 1924 of income taxes paid under protest, was repealed by Act No. 8 of the Laws of 1927.

The interpretations of local law by the Supreme Court of Puerto Rico, unless clearly wrong, are followed by this court. The insular court is in a better position to interpret the intent of the local legislature than this court, and we are inclined to follow its construction in this instance, *De Villanueva v. Villanueva*, 239 U. S. 293, 299, 36 S. Ct. 109, 60 L. Ed. 293; *Cardona v. Quiñones*, 240 U. S. 83, 88, 36 S. Ct. 346, 60 L. Ed. 538; though we think Act No. 8 of the Laws of 1927 may be susceptible of another reasonable interpretation."

If such a construction subsists, everything we have herein stated and decided in this opinion by application of Section 76 of Law No. 74 of 1925 would fall by its own weight.

We realize the difficult situation, but a careful and thorough study of the question compels us to decide it differently from our decision in the said case of *American Colonial Bank, supra*, affirmed, but which was not really relied on with all its consequences in the other case of *Soto Gras, supra*, since the jurisdictional ruling established in the special law and not that of the general law was finally applied.

Our grounds for reaching the aforesaid conclusion are that Law No. 74 of 1925 is a special law, complete, referring to a certain tax—income tax—clearly worded, which should prevail over the general law referring to suits in cases of taxes paid under protest, especially when said general law contains a repealing clause which reads:

“Section 6. Act No. 9 of June 23, 1924, and Act No. 84 of August 20, 1925, are hereby repealed, as well as all laws or parts of laws in conflict herewith; Provided, That any act, proceeding or right born under the protection of the laws hereby repealed, shall continue so protected by the provisions thereof, until its termination.” (Laws of 1927, p. 124.)

The laws expressly repealed, i. e., No. 9 of 1924 and No. 84 of 1925, were also laws of a general character, as were Law No. 17 of 1920, repealed by Law No. 9 of 1924, and Law No. 35 of 1911—the first law on the matter—which was repealed by Law No. 17 of 1920.

The general system relative to suits in cases of taxes paid under protest being in force, and laws complete in themselves having been approved, the clear purpose of the legislator was that both laws should subsist within their own scope of action. If any doubt should subsist it would be dispelled by the action of the legislature itself in this year 1936 amending said section 76 of Law No. 74 of 1925 by adding thereto the following proviso: “Provided, that once the case is decided

upon a first reconsideration, no other proceeding shall be entertained by the Board, with the exception of what is provided in subdivision (b) of this section", which implies that it considered said section to be in force, notwithstanding the general law that it enacted in 1927 regarding payment of taxes under protest. See the cases of *Kessler v. Domenech, Treasurer*, 49 D. P. R. 196, and *Sucesión Puente v. El Pueblo*, 19 P. R. R. 560.

Wherefore, the motion for reconsideration is hereby dismissed and the judgment appealed from should be affirmed.

EMILIO DEL TORO,
Chief Justice.

OPINION OF SUPREME COURT OF PUERTO RICO

Delivered by Chief Justice Mr. DEL TORO.

San Juan, Puerto Rico, February 26, 1937.

The reconsideration of the judgment rendered in this case on the 23d of July, 1936, has been prayed for.

It seems advisable to remember that this appeal was originally decided by judgment of November 13, 1935, affirming the judgment appealed from, and that it was appellant itself who petitioned this court to modify "the opinion handed down in this case holding that the doctrine established in the cases of *American Colonial Bank of Puerto Rico v. Gallardo*, and *Soto Gras v. Domenech*, has not been modified in any manner; conforming the opinion and judgment in this case with the doctrine established in the aforementioned cases, or making the corresponding distinction, if possible, between the doctrine established in this case and the doctrine established in said other cases, for the purpose of preventing serious confusion as to the construction of the law and the authorities applicable and to prevent serious injury to taxpayers who up to this date have acted and proceeded for the protection and defense of their rights in

accordance with the decision of this court in the aforementioned cases.”

Realizing the necessity of establishing a clear final rule on the matter, this court decided to reconsider and did reconsider its said judgment of November 13, 1935, and decided to hear the parties again, as it did hear them amply, in writing and orally, and also heard the amicus curiae Mariano Acosta Velarde.

And it was by virtue of said careful study by the attorneys and by the court that the latter finally came to face with the unavoidable question of a written provision of law which had to be made effective. Such is the gist, on a final analysis, of the lengthy opinion of which appellant now complains. It was on appellant's own request that the question was finally cleared, so that the injuries to which said appellant party refers in its motion for reconsideration may not continue to be occasioned.

We realized the difficulty of the question when we found that it had been decided to the contrary by the Circuit Court of Appeals for the First Circuit, and we so stated in the said opinion. 50 D. P. R. 405, 417.

Appellant now contends that the decision of the Circuit Court constitutes a rule of *stare decisis* which should be accepted and followed. It might be so but is not, in our judgment, under the concurring circumstances.

In the first place, the time elapsed is too short for an unassailable rule of *stare decisis* to have arisen; in the second place, in following the decisions of this Supreme Court the District Court acted in a manner that does not reveal its own conviction but deference to the local tribunal, and in the third place, the question is one of written law and once the law has been purified it is not susceptible of construction. Courts have no legislative powers.

The reconsideration prayed for should be denied.

EMILIO DEL TORO,
Chief Justice.



FEB 27 1939

CHARLES ELMORE DROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,
against

YABUCOA SUGAR COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

EARLE T. FIDDLER,
Attorney for Respondent.

ANDREW KIRKPATRICK,
HERBERT S. McCONNELL,
Of Counsel.



INDEX.

Brief for Respondent.

	PAGE
STATEMENT	1
NATURE OF ACTION	2
QUESTIONS PRESENTED	3
FACTS	4
CONTENTIONS OF RESPONDENT	4
STATUTES INVOLVED	6
POINTS OF ARGUMENT.....	7
FIRST—Historical and comparative considerations.	7
SECOND—The nature of the Treasurer's duty to refund overpayments	12
THIRD—The obligation of the Legislature of Puerto Rico to provide a recourse to the courts.....	16
FOURTH—The Legislature expressly authorized suit to recover overpayments of income tax.....	16
FIFTH—Payment under protest as a condition precedent to bringing suit	19
SIXTH—The Treasury Regulations	24
SEVENTH—The power of the Board of Equalization to determine the facts	26
EIGHTH—The function of the court in suits against the Treasurer for the recovery of taxes.....	28
NINTH—The decision of the Supreme Court of Puerto Rico was clearly erroneous.....	30
TENTH—The judgment of the Circuit Court of Appeals for the First Circuit should be affirmed	40
APPENDIX A	41
APPENDIX B	62

TABLE OF CASES

	PAGE
<i>American Colonial Bank v. Domenech</i> , 43 D. P. R. 889	36
<i>Chesbrough v. United States</i> , 192 U. S. 253	23
<i>Compania Agricola de Cayey, Ltd. v. Domenech</i> , 47 D. P. R. 535	18, 30, 31, 33, 34, 35, 36
<i>Curtis Adm̃. v. Fiedler</i> , 2 Black 461	23
<i>Dismuke v. United States</i> , 297 U. S. 167, 172, 173	16, 19, 20
<i>Domenech v. Verges</i> , 69 Fed. (2d) 714	20
<i>Elliott v. Swarthout</i> , 10 Pet. 137	23
<i>Graham v. Du Pont</i> , 262 U. S. 234, 258	17, 20
<i>Greenport Basin & Construction Co. v. United States</i> , 269 Fed. 58, 59, aff'd. 260 U. S. 512	15, 23
<i>Hyatt Roller Bearing Co. v. United States</i> , 43 Fed. (2d) 1008, 1021	15, 23
<i>Little v. Bowers</i> , 134 U. S. 547	23, 35, 36
<i>McCormick v. Bonner, Treasurer</i> , 44 D. P. R. 432 (Spanish) decided in 1933	21, 31, 36
<i>Moore Ice Cream Co. v. Rose</i> , 289 U. S. 374	23
<i>Porrata v. Domenech</i> , 51 D. P. R. 215	25
<i>Porto Rico Fertilizer Company v. Domenech</i> , 98 F. (2d) (Advance Sheets) 398-404	2, 20, 30, 33, 34, 35, 36
50 D. P. R. 962	1
51 D. P. R. 135	2
<i>Serralles v. Treasurer</i> , 30 P. R. R. 220	8, 10, 21, 31, 33, 36
<i>Soto Gras v. Domenech</i> , 45 D. P. R. 940	26
<i>South Porto Rico Sugar Company v. Treasurer</i> , 26 P. R. R. 446	21, 31

	PAGE
<i>Tucker v. Alexander, Collector</i> , 275 U. S. 228.....	17
<i>Tyson v. Commissioner</i> , 68 F. (2d) 584 (cert. denied 292 U. S. 657)	25
<i>United States v. Cuba Mail S. S. Co.</i> , 200 U. S. 488..	23
<i>United States v. Hvoslef</i> , 237 U. S. 1, 12.....	15, 19, 22, 39
<i>United States v. Jefferson Electric Co.</i> , 291 U. S. 386, 396, citing 26 U. S. C. 156; 28 U. S. C. Sec. 41 (20) ..	17
<i>United States v. Jin Fuey Moy</i> , 241 U. S. 394, 401....	13
<i>United States v. Jones</i> , 236 U. S. 106 (1914).....	22
<i>United States v. Laughlin</i> , 249 U. S. 440, 443.....	13, 14, 28
<i>United States v. Memphis Cotton Oil Co.</i> , 228 U. S. 62, 66	18
<i>United States v. Michel</i> , 282 U. S. 656, 658.....	17
<i>United States v. Morehead</i> , 243 U. S. 607.....	25

STATUTES.

FEDERAL

General Law (Act No. 8 of 1927).....	20
Revenue Act of 1924	
Sec. 3226	10, 11, 12, 16, 17, 18, 21, 22, 23, 24, 29
Sec. 3220	9, 12
Income Tax Law of 1924 ✓	
Sec. 76(a) ..	2, 4, 5, 8, 11, 18, 19, 20, 32, 35, 36, 37, 38, 40
Sec. 76(b)	
4, 9, 10, 11, 12, 16, 18, 19, 20, 24, 25, 34, 35, 36, 37, 38, 40	
Income Tax Law of 1925 (No. 74) Sec. 76.....	37
Income Tax Law of 1927 (No. 8)	39

PUERTO RICO

PAGE

Law No. 43, Income Tax Act of 1921

Secs. 38, 41, 42, 43, 44, 45, 46	6
Sec. 47	6, 10
Sec. 63	6

Law No. 80, Income Tax Act of 1919

Secs. 34, 37, 39, 54, 57, 58, 59, 60, 61, 62	6
Sec. 63	6, 10, 32
Sec. 66	6, 8, 9, 10, 12, 25, 31, 32, 34, 35, 38
Sec. 67	6

Act No. 74, Income Tax Act of 1924

Secs. 27, 39, 53	6, 9
Sec. 54	6, 13, 14, 24, 28
Sec. 55	6, 13, 14, 15, 24, 35
Secs. 56, 57	6
Sec. 64	6, 13, 33, 35
Sec. 64b	19, 21
Sec. 64c	17, 25
Sec. 67	6, 26
Sec. 68	6
Sec. 75	6, 13, 35
Sec. 76	6, 24, 39
Sec. 76(a)	10
Sec. 76(b)	6, 10
Sec. 85	6

Political Code

Secs. 308, 310	6
----------------------	---

Civil Code of Puerto Rico

Section 1795	21, 22
--------------------	--------

Regulations No. 1

Article 355	6
Regulation No. 355	24, 34

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 498.

RAFAEL SANCHO BONET, *Treasurer of Puerto Rico,*
Petitioner,
against

YABUCOA SUGAR COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

Statement.

The case comes before this Court on a writ of certiorari granted on petition of the Treasurer of Puerto Rico, the defendant below. The writ was directed to the Circuit Court of Appeals for the First Circuit to review the judgment of that Court entered July 13, 1938, vacating the judgment of the Supreme Court of Puerto Rico in favor of the defendant entered July 28, 1936, and remanding the case to that court for further proceedings not inconsistent with the opinion of the Circuit Court.

The opinion of the Supreme Court is reported in 50 D. P. R. 962 (Spanish ed.) and on reconsideration in 51

D. P. R. 135 (Spanish ed.). The opinions of the judges of the Circuit Court are reported in 98 F. (2d) 398-404. The three opinions of the Supreme Court of Puerto Rico in *Porto Rico Fertilizer Company v. Domenech*, upon which its opinion in this case was based, are attached hereto as Appendix B.

Nature of the Action.

The action was brought in the District Court of San Juan by Yabucoa Sugar Company as plaintiff, against the Treasurer of Puerto Rico, as defendant, to recover an overpayment of income tax in the sum of \$6,803.66, plus interest. The plaintiff had filed a claim for credit or refund with the Treasurer within four years after payment, as provided by law, which had been denied by the Treasurer and allowed by the Board of Review and Equalization on appeal (Complaint R., 1-6).

The District Court dismissed the complaint on demurrer, on the ground that the tax had not been paid under protest according to Section 76 (a) of the Income Tax Law and that there was no remedy by suit (R., 14). The judgment of the District Court was affirmed by the Supreme Court of Puerto Rico on the grounds (1) that no protest had been made at the time of payment and (2) that taxpayer may not resort to the courts from the decision of the Treasurer (R., 20-22). The respondent appealed to the Circuit Court of Appeals for the First Circuit, which vacated the judgment of the Supreme Court, and remanded the case for further proceedings (R., 37).

The sufficiency of the facts to state a cause of action, other than the fact that the tax had not been paid under protest, was not considered or passed on in any court below.

The action was not an appeal from the decision of the Treasurer as stated by Petitioner (Brief 1) but an original action at law.

Questions Presented.

The fundamental question involved is whether a taxpayer, who has calculated and paid his Puerto Rican income tax on the basis of such calculation, as required by law, and filed a claim for credit and refund of an overpayment with the Treasurer within four years after payment as permitted by law, has *any* recourse to the courts after denial of his claim by the Treasurer. The Supreme Court of Puerto Rico held *without qualification* that the respondent "is without remedy by suit" on the theory that "this is a discretionary matter with the Treasurer," and, furthermore, that "by legislative enactment a payment under protest is a condition precedent to recovery by suit" (R., 21).

The questions presented are therefore:

First: Is the taxpayer without *any* recourse to the courts if the Treasurer denies his claim for credit or refund of an overpayment?

Second: Is payment under protest an essential condition precedent to bringing suit?

Third: Assuming that the taxpayer may bring suit to recover, did the Respondent properly present his case before the court?

(1) Had the Board power to reinvestigate the facts or pass only on questions of law?

(2) Will the Puerto Rican courts accept the facts as found by the Treasurer or by the Board of Equalization on appeal, as correct, and investigate only whether the law has been correctly applied to the facts, or is the matter heard on trial of facts and law?

(3) Has the complaint in this case stated a cause of action?

Fourth: Is the decision of the Supreme Court of Puerto Rico clearly wrong?

Facts.

The facts alleged in the complaint, and admitted for the purposes of the demurrer, are as follows:

That for the taxable year 1927 plaintiff filed its income tax return showing a taxable income of \$201,897.29 and paid \$25,234.92 as income tax; that the defendant notified a deficiency assessment of \$1301.51, that complainant appealed therefrom to the Board of Review and Equalization; that the Board accepted all items specified in the notice of deficiency except an item for repairs, and admitted on that account the total amount appearing on the books of plaintiff less \$18,208.78; that the total amount appearing on the books was \$133,700.61 from which item \$18,208.78 was stricken as improvements, leaving a balance of \$115,491.83; that as per the notice of deficiency the defendant had accepted \$51,216.65 deduction for repairs, which resulted in a net additional deduction for repairs of \$64,275.18, entitling complainant to a refund of \$6,803.66; that complainant filed a claim for credit and refund of said \$6,803.66 with defendant, of which \$525.56 was granted. That complainant again appealed to the Board which affirmed its original ruling.

That the Treasurer of Puerto Rico in granting to the plaintiff a refund of \$525.56 plus \$60.61 for interest, instead of \$6,803.66, "has done so in an arbitrary, unlawful, capricious and wilful manner, and without any authority or power to do so" (R., 6).

Contentions of Respondent.

On the First Question Presented (see "Questions Presented" supra, p. 3), respondent maintains that the taxpayer is given a remedy by suit and that, in arriving at the opposite conclusion, the Supreme Court of Puerto Rico erred (1) in its major premise, namely that this is a *discretionary* matter with the Treasurer, (2) in holding that the provisions of Section 76 (a) of the Income Tax Law of 1924 are applicable, and (3) in failing to apply the provisions of 76 (b) of the Law.

On both essential points, namely that this is not a discretionary matter and that section 76 (a) is not applicable, all three judges of the Circuit Court of Appeals (R., 24-36) disagree with the Supreme Court and the petitioner himself has either agreed with the Circuit Court or conceded (Brief, 25, 37, 38 and footnote).

The contention, however, of the petitioner is that while the Treasurer is charged with the duty of passing on claims for refund he is only "bound by the rules of fair play applicable to all hearings and decisions of administrative tribunals" (Brief, 39), and that after a "full and fair" (Brief, 3) hearing has been accorded and after the Treasurer has performed his duty "to judge the merits of the claim" (Brief, 39) and has thus judged and decided it, then the taxpayer "has no appeal to the courts from the Treasurer's decision. It is final" (Brief, 39). The contention, in other words, is that the Treasurer, an interested administrative official, is the *sole* and final judge of what are "the rules of fair play", of what is a "full and fair" hearing, and of what are the merits of the claim. Petitioner concedes that a mandamus would lie (Brief, 38, footnote).

The limitations conceded by the petitioner are not conceded by the Supreme Court of Puerto Rico in its opinions.

On the Second Question Presented (see "Questions Presented" *supra*, p. 3), respondent maintains that no protest is required as a condition precedent to suit and that the court erred in applying section 76 (a) of the Income Tax Law of 1924; and in failing to apply principles of the Civil Law and its own previous decisions.

On the Third Question Presented (see "Questions Presented" *supra*, p. 3), assuming that the taxpayer may resort to the courts, the question has been raised in this court for the first time as to the sufficiency of the pleadings. Respondent maintains:

(1) That the Board of Review and Equalization had full power to investigate the facts independent of the determination of the Treasurer, and modify the return accordingly.

(2) That in a suit to compel the Treasurer of Puerto Rico to return amounts unduly paid as Income Tax, the matter is tried on the facts and law.

(3) That in view of the determination by the Board the burden was on the Treasurer to raise questions of fact by answer.

(4) That whether or not the facts alleged in the complaint on the merits were sufficient to state a cause of action, was not passed upon in any court below and should not be raised originally in this court.

On the Fourth Question Presented (see "Questions Presented" supra, p. 3), Respondent maintains that the decision of the Supreme Court of Puerto Rico was clearly erroneous.

Statutes Involved.

For the convenience of the Court the pertinent provisions of the following statutes are printed as an appendix to this brief (Appendix A):

Sections 34, 37, 39, 54, 57, 58, 59, 60, 61, 62, 63 66 and 67 of the Puerto Rican Income Tax Act of 1919, Law No. 80 of June 26, 1919.

Sections 38, 41, 42, 43, 44, 45, 46, 47 and 63 of the Puerto Rican Income Tax Act of 1921. Law No. 43 of July 1, 1921.

Sections 27, 39, 53, 54, 55, 56, 57, 64, 67, 68, 75, 76 and 85 of the Income Tax Act of 1924, Act No. 74 of Aug. 6, 1925.

Sections 3220 and 3226 of United States Revised Statutes as Amended by Federal Revenue Act of 1924 (See Sections 75 and 76(b) of the Puerto Rican Act of 1924).

Article 355 of Income Tax Regulations No. 1 under the Income Tax Act of 1924.

Sections 272 and 281 of the Federal Revenue Act of 1924 (See Sections 55 and 64 of the Puerto Rican Act of 1924).

Pertinent part of Sections 308 and 310 of the Political Code as Amended by Act No. 75 of August 2, 1923.

POINTS.

FIRST.

Historical and comparative considerations.

The income tax law under consideration (The Income Tax Act of 1924, herein referred to as the 1924 Act) was the first legislation in Puerto Rico under which the taxpayer was required to pay his income tax on the basis of his own calculation without any examination of his return or notice or demand on the part of any government official.

Under the Income Tax Act of 1919 (referred to as the 1919 Act) the taxpayer was required to make a return (Section 34 Individual Returns Appendix A 41) (Section 37 Corporate Returns Appendix A 41) which had to be filed before the first day of March of each year or within sixty days subsequent to the termination of the legal business year (Section 39 Appendix A 42). The taxpayer did not pay an installment of the tax on filing his return. On the contrary the Treasurer, on the basis of the return, calculated the amount of the tax which he notified to the taxpayer, and the taxpayer paid the first installment of the tax within thirty days of notification to him of the amount of the tax (Section 54 Appendix A 42). If the taxpayer did not agree with the amount determined by the Treasurer he might ask for a reconsideration (Section 58 Appendix A 43). If the Treasurer dismissed the petition for reconsideration the taxpayer then had the right to appeal to the Board of Review and Equalization within fifteen days (Section 61 Appendix A 44). The decision of the Board was final, but the taxpayer could then pay the tax imposed upon him under protest and within ten days thereafter file a complaint before a court of competent jurisdiction (Section 63 Appendix A 44).

However, the taxpayer had the right to bring suit to recover an *overpayment* even though he had not followed the

above procedure and had made no protest at the time of payment.

Section 66 of the 1919 Act provided:

"That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.

"That when proper claim has been made to the Treasurer or Puerto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act."

Construing this section, the Supreme Court of Puerto Rico in *Serralles v. Treasurer*, 30 P. R. R. 220 held that a taxpayer, who had paid his tax *without protest*, and even though he had not complied with the provisions of Sections 61, 62 and 63, with respect to appeal to the Board of Review and Equalization, and payment under protest, could bring suit and recover an overpayment. In other words the taxpayer had two independent courses open to him.

This result was reached by the Supreme Court of Puerto Rico although, no provision of the 1919 Act specifically dispensed with protest in the case of overpayment, and yet the same court in the present case, under the 1924 Act, which like the 1919 Act has no affirmative provision requiring protest, held that "by legislative enactment a payment under protest is a condition precedent to recovery by suit."

The 1921 Act had substantially the same procedure as the 1919 Act, as to filing the return, determination of the tax by the Treasurer and payment of the tax after receipt of such notification. The 1921 Law provided for appeal to the Board of Review and Equalization where the Treasurer had modi-

fied the return of the taxpayer, but there was no provision for suit to recover an overpayment similar to Section 66 of the 1919 Act above quoted, or section 76 (b) of the 1924 Act.

Under the present statute (the 1924 Act) a new system as to payment was installed, following almost verbatim in its general provisions the Federal Act of the same year. The taxpayer no longer was privileged to wait until the Treasurer determined the amount of his tax on the basis of his return before paying the tax. On or before the final date for filing the return the taxpayer must pay the first installment of the tax on the basis of his own calculation (Sections 27, 39, 53 Appendix A 48). This was something new, and placed on the taxpayer himself the burden of determining the amount of the tax. However, the law was very careful to safeguard the taxpayer against overpayment. By section 54 (Appendix A 50) the Treasurer is required to examine the return as soon as practicable after it is filed and determine the correct amount of the tax. Section 55 (Appendix A 50) provides that if the taxpayer has paid as an installment of the tax more than the amount determined, the excess *shall* be credited or refunded. This section is copied verbatim from Section 272 of the Federal Act of 1924 (Appendix A 58). Section 64 (a) and (b) (Appendix A 52) provides that overpayments *shall* be credited or refunded to the taxpayer *immediately*, with the qualification that no credit or refund shall be allowed or made after four years after payment unless the taxpayer has filed a claim for credit or refund within such four years. This section follows the wording of Section 281 of the Federal Act of the same year (Appendix A 59).

Section 75 (Appendix A 53) authorizes the Treasurer to remit, refund and pay back all taxes erroneously or illegally collected to substantially the same effect as the first paragraph of Section 66 of the 1919 Act above quoted, but the wording follows the wording of U. S. R. S. 3220, rather than that of section 66 of the 1919 Act above quoted.

Section 63 of the 1919 Act (Appendix A 44), which corresponds to Section 47 of the 1921 Act (Appendix A 47) and provides that the decision of the Board of Review and Equalization shall be final, but that the taxpayer may pay the tax imposed upon him within a stated period and bring suit, is incorporated in the 1924 Act as Section 76 (a) (Appendix A 54) with unimportant changes. This subsection relates solely to deficiency assessments (Petitioner's Brief 25).

The second paragraph of Section 66 of the 1919 Act is omitted, but Section 76 (b) is added, following the wording of U. S. R. S. 3226. Since Section 76 (a) fully covers the procedure as to deficiency assessments, this subdivision (76 (b)) can have no meaning whatever unless it was inserted to take care of the overpayments with the same effect as was given to the second paragraph of Section 66 of the 1919 Act by the decision in the *Serralles* case (*supra*).

To summarize, the 1919 Act provided for two situations, namely deficiency assessments and overpayments. In both situations there was an opportunity to appeal to the Board, and in the case of overpayments a Section 66 independently authorized suits for recovery without appeal to the Board. The 1921 Act provided for no recourse to the courts for overpayments. The 1924 Act provided for the same two situations as the 1919 Act with the difference, however, that in only one of them, namely deficiency assessments, were there specific provisions for appeal to the Board of Review and Equalization (except the provision of Section 76 (b)). Obviously the reason for this is that this is the only situation where there was a determination by the Treasurer prior to the payment of the tax. The taxpayer himself determined and paid his tax and therefore, in the case of overpayment, there was no appealable situation at time of payment.

Section 76 (a) of the 1924 Act, taken from previous Puerto Rican legislation and not from the Federal Law, fully and exclusively covers the situation as to suits to recover where there has been a deficiency assessment, and

leaves nothing more to be said on that subject. However, Section 76 (b) is taken from U. S. Revised Statutes Sec. 3226, and makes reference both to suits where there has been an erroneous or illegal assessment (which can only be in the case of deficiency assessments already covered in the preceding clause 76 (a)) and also to claims for refund or credit which could only refer to over-payment as distinguished from deficiency assessment. It then provides that no suit can be brought "until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on Appeal, according to the law in that regard".

Does Section 76 (b) mean nothing, as the Supreme Court of Puerto Rico and petitioner contend; or does it mean (1) that no suit may be brought in the case of an erroneous or illegal assessment, namely a *deficiency assessment*, until an appeal has been taken to the Board (which would be merely a repetition of the provisions of clause (a)) and also (2) that no suit may be brought to recover an *overpayment* until a claim has been filed with the Treasurer and with the Board of Review and Equalization on appeal, this being the *only* situation where a claim for credit and refund had been provided for?

Any apparent confusion in the wording is explained by the fact that U. S. R. S. 3226, which is a general law referring to all kinds of taxes and intended to cover all situations, was incorporated as Section 76 (b), without taking into consideration that one situation, namely deficiency assessments, had been fully disposed of in Section 76 (a), taken from previous local laws.

According to normal canons of construction the section must be given the most reasonable meaning possible, in view of the entire legislation, rather than dismiss it as meaningless, and since the meaning approved by the majority of the Circuit Court would seem to fairly reflect the spirit and intent of the legislation, we believe that it should be affirmed.

The language of Section 76 (b) and R. S. 3226 is almost identical except that Section 3226 R. S. applies to all internal revenue taxes, whereas Section 76 (b) applies only to this special tax, namely income and excess profits tax. Where Section 3226 reads—"until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of the law in that regard, and the regulations of the Secretary of Treasury established in pursuance thereof," Section 76 (b) substitutes "the Treasurer and with the Board of Review and Equalization on appeal" for "the Commissioner of Internal Revenue" and omits the words "of the Secretary of Treasury".

Section 3226 Revised Statutes had been amended in 1924 by adding "but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress". This amendment was not carried into Section 76 (b) of the Puerto Rican Act for reasons appearing more fully hereafter.

SECOND.

The nature of the Treasurer's duty to refund overpayments.

The Supreme Court held that "this is discretionary matter in the Treasurer" (R., 21). If this were correct, the conclusion of the court that there is no right to file suit against the Treasurer, would necessarily follow, as the courts will not interfere with an administrative officer in the exercise of his discretion either by suit at law or by mandamus. If it is not correct then the conclusion of the court is founded on an incorrect premise.

On the other hand, if it is a discretionary matter, the court has committed an error equally serious. If it is solely within the discretion of the Treasurer whether or not there

has been an overpayment and if so whether or not it should be returned, then the Legislature has delegated its legislative power to the Treasurer and this it cannot do, as no such authority is conferred on the Legislature by the Organic Act. *United States v. Laughlin*, 249 U. S. 440, 443. The statute should be construed, if possible, "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score" *United States v. Jin Fuey Moy*, 241 U. S. 394, 401.

The pertinent sections of the law are Sections 54, 55, 64 and 75, which read:

"Section 54: As soon as practicable after the return is filed the Treasurer shall examine it and shall determine the correct amount of the tax."

Sec. 55. "If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess *shall be* credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess *shall be* credited or refunded as provided in Section 64." (See 272 Federal Act of 1924 Appendix A 58).

Sec. 64: "Where there has been an overpayment of any income or excess-profits tax imposed by this Act * * * the amount of such overpayment *shall be* credited against any income or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess *shall be* refunded *immediately* to the taxpayer." (See Section 281 of the Federal Act of 1924 Appendix A 59).

Sec. 75: "The Treasurer is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected * * *" (See Section 3220 R. S. U. S. Appendix A 55). (Italics supplied.)

Even the dissenting judge of the Circuit Court of Appeals, (Judge Morton R., 34) held that if there is an overpayment it is the duty of the Treasurer to make a proper refund. It is hardly necessary to cite cases. The language is clearly mandatory. While permissive language is often construed as mandatory, it would be a rare case where mandatory language is construed as permissive.

The Treasurer can not escape his duty or a review by the Courts on the ground that he has not made a determination as provided in Section 54, or that he has made a determination adverse to the taxpayer. Section 54 directs the Treasurer to determine the *correct* amount of the tax. Section 55 directs him to credit or refund any amount determined to be in excess of the correct amount. Nowhere in the Act is his determination declared to be final or conclusive. The question is whether the power of the Treasurer to determine is conclusive or whether such determination by him is subject to review by the Courts.

In *United States v. Laughlin*, 249 U. S. 440, the statute provided that "where it shall appear to the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives." The Government contended that a favorable decision by the Secretary is a condition precedent to the right of recovery. The court rejected this argument in the following language:

"We cannot accept this construction of § 2 of the Act of 1908. According to it, although facts were made to appear to the entire satisfaction of the Secretary showing that a person had made 'payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws,' it would rest in the uncontrolled judgment and discretion of the Secretary to deny repayment of the excess because not satisfied that

it ought to be repaid, notwithstanding Congress had declared that under the precise state of facts it should be repaid. *Under this construction the legislative power would in effect be delegated to the Secretary*" (italics supplied).


Corresponding and similar sections of Federal Tax legislation have been held to be mandatory. *Greenport Basin & Construction Co. v. United States*, 269 Fed. 58, 59, aff'd. 260 U. S. 512; *Hyatt Roller Bearing Co. v. United States*, 43 Fed. (2d) 1008, 1021; *United States v. Hvoslef*, 37 U. S. 1, 12.

If the power of the Treasurer is limited to the extent admitted by petitioner (Brief 38, 39), there must be some way to compel the Treasurer to do his duty according to the law. If there is no remedy at law we agree with petitioner that a mandamus will lie, but that is not what the Supreme Court held.

The decision of the Supreme Court gives the Treasurer absolutely uncontrolled and arbitrary power—a power which places an administrative official, not qualified by training, and anxious to maintain the revenues of the government at the highest possible level, *in a position where he, an interested party, is the final judge of both fact and law.* He is hardly likely to exercise this power in favor of the taxpayer if he knows that there is no recourse to the courts. Under the decision of the Supreme Court there can be no escape from the conclusion reached by Judge Bingham that the payment of the taxpayer's just claim would be left solely to the whim of the Treasurer (R., 28). *United States v. Laughlin (supra)*.

The Legislature hardly intended this result.

MICROCARD

TRADE MARK 

22



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

2
8
7
3

3
8
-
9
9



THIRD.

The obligation of the Legislature of Puerto Rico to provide a recourse to the courts.

It is conceded that the Legislature is not obligated to provide a remedy by suit.

The question, however, is whether the Legislature in this particular situation did provide a remedy either by express language or by necessary implication.

As stated by this court in *Dismuke v. United States*, 297 U. S. 167, 172, in the part of the quotation omitted by asterisks in petitioner's brief (p. 22):

“But, in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer.”

FOURTH.

The Legislature authorized suit to recover over-payments of income tax.

The questions (1) whether or not the Legislature authorized suit, and (2) whether or not, having authorized suit, payments under protest is an essential condition precedent thereto, are independent questions and will be treated separately.

Section 76 (b) provides that no suit may be brought *until* a claim for refund or credit has been filed. In this respect its language is the same as Sec. 3226, United States Revised Statutes.

This court has expressly held that that section authorizes suit against the United States and the Collector of Internal Revenue. *United States v. Michel*, 282 U. S. 656, 658; *Graham v. Dupont*, 262 U. S. 234, 258.

The situation is the same whether the suit is against the Collector or against the United States. *United States v. Jefferson Electric Co.*, 291 U. S. 386, 396, citing 26 U. S. C. 156 (R., S. 3226) and the so-called Tucker Act (suits against the United States), 28 U. S. C. Sec. 41 (20); *Tucker v. Alexander, Collector*, 275 U. S. 228.

The argument is made that this is a "negative pregnant," in other words that since the statute only provides that no suit may be brought until a claim is filed, it cannot be implied that suit may be brought if a claim is filed; that unless there exists elsewhere definite provision, there is "no law in that regard."

Petitioner draws an analogy between the rules of construction of a statute and the construction of a pleading.

The Income Tax Law of 1924 is not a pleading phrased in "negative pregnant" to mislead an opposing pleader. It is a solemn act of the Legislature adopted to define the rights of the taxpayer and of the Government. When the Legislature provided that no suit shall be brought until a claim for refund or credit has been duly filed with the Treasurer, it must necessarily have referred to the only claims for refunds or credits which were provided for in the law, namely claims for credits or refunds of overpayments covered by Section 64 (c) under the title, "Credits and Refunds," and must have intended it to be understood that suit can be brought if such claim has been filed. "The statute (referring to R., S. 3226) and the regulations must be read in the light of their purpose. Statutes are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparation for trial." *Tucker v. Alexander (supra)*.

To construe the phrase "according to the provisions of the law in that regard" as modifying "suit or proceeding" (See dissenting opinion Judge Morton, R., 357 and petitioner's brief, pp. 24-25), distorts the grammatical construction of the clause. To justify that construction, since the clause begins with a negative, the word "except" or its equivalent would have to be read into the clause before the words "according to" in order to make it grammatically correct. The phrase "according to the provisions of the law in that regard," naturally, grammatically and clearly refers to the immediately preceding language with respect to the filing of the claim and the appeal to the Board. This court has constantly construed the words in U. S. R. S. 3226 "according to the provisions of law in that record and the regulations of the Secretary of Treasury established in pursuance thereof" as referring to the claim for refund or credit filed with the Commissioner of Internal Revenue. *United States v. Memphis Cotton Oil Co.*, 228 U. S. 62, 66.

The construction contended for by petitioner not only is opposed to the constant construction of the same language by this court but is not a construction adopted by the Supreme Court of Puerto Rico. The Supreme Court of Puerto Rico in one of the two decisions relied on, *Compania Agricola de Cayey, Ltd. v. Domenech*, 47 D. P. R. 535, ignored the section altogether, and in the other, *Porto Rico Fertilizer Co. v. Bonet* (See Appendix B), held that it was surplusage on the theory that the case was governed by Section 76 (a). Both these cases are fully discussed below.

If, therefore, the taxpayer has complied with the conditions precedent to bringing suit established by Section 76 (b), that section authorizes suit to be brought.

FIFTH.

Payment under protest as a condition precedent to bringing suit.

The Supreme Court concedes that compliance with the condition is impossible in the nature of things:

"We can realize that it would have been difficult or almost impossible at the time of payment of the taxes for it [the taxpayer] to know that it was paying the same in excess of the amount due. It is necessarily true that when a taxpayer makes a voluntary payment he is ordinarily not conscious that such a payment is an excessive one" (R., 20).

Whether or not protest is required must be determined "in the light of the manifest purpose and scope of the legislation." *United States v. Hvoslef*, 237 U. S. 1, 12.

"Resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrator." *Dismuke v. United States* (supra).

Payment under protest is not expressly required by statute.

While protest is expressly required by section 76 (a) as a condition precedent to suit where the Treasurer has assessed a deficiency against the taxpayer, who has appealed to the Board which has sustained the Treasurer, and the Taxpayer has *then* paid the tax, there is no provision in section 76 (a) or elsewhere requiring protest at the time of payment as a condition precedent to recovering an *overpayment*.

The only condition found in the income tax law other than those contained in section 76 (b) itself is that the taxpayer shall have filed his claim for credit or refund within four years after payment (Section 64 (b)) if the Treasurer of

his own accord has not made a proper refund as he is required by law to do.

Since no protest is required in order to enable the Treasurer to entertain a claim for credit or refund (see Section 64) it would be a most unusual situation if, after the claim has been denied, suit can be brought only if the original payment had been made under protest.

Section 76 (b) requires only that the taxpayer shall have filed a claim for refund or credit with the Treasurer and with the Board of Review and Equalization on appeal, within the four year period required by Section 64 (b).

No suggestion has been made that the "claim for refund or credit" means or implies a payment under protest. If this were the case we would be reading something into the section which is not there. The Supreme Court does read into Section 76 (b) the requirement of payment under protest, but it does so by taking it out of its context in Section 76 (a), *Porto Rico Fertilizer Co. v. Domenech* (Appendix B) and not by inference from the wording of Section 76 (b) (see below p. 36). All three judges of the Circuit Court of Appeals and the petitioner concede that Section 76 (a) has no application.

We must look elsewhere for the statutory requirement of payment under protest if there is such requirement.

It is not in the General Law (Act No. 8 of 1927), for the court held that this law is not applicable as the Income Tax Act of 1924 "is a special law, complete, referring to a certain tax—income tax—clearly worded, which should prevail over the general law referring to suits in cases of taxes paid under protest" (Appendix B 76).

The general principles of law applicable in Puerto Rico do not predicate recovery on payment under protest.

The common law (*derecho comun*) of Puerto Rico is not derived from English sources but from the Civil Law system as expressed in the Civil Code.

Under the 1919 Act which had also provided for the return of overpayments, the Supreme Court had already held that suit could be maintained although the taxpayer had not paid under protest and although the 1919 Act contained no provision excusing protest. *Serralles v. Treasurer* (supra). *McCormick v. Bonner, Treasurer*, 44 D. P. R. 432 (Spanish). This is in harmony with the *Civil Law*, which in contradistinction to the *common law* in force on the Continent, expressly provides (Civil Code of Puerto Rico, Section 1795):

“If a thing is received when there was no right to claim it and which, through an error, has been unduly delivered, there arises an obligation to restore the same.”

In discussing the application of this section the Supreme Court in *South Porto Rico Sugar Company v. Treasurer*, 26 P. R. R. 446, remarked:

“Mr. Chief Justice Fuller in *Chesebrough v. United States*, 92 U. S. 259, said: ‘The rule is firmly established that taxes voluntarily paid cannot be recovered back and payments with knowledge and without compulsion are voluntary.’ In *Guerra v. Treasurer*, 8 P. R. R. 280 (1905) this court held that a payment of taxes without duress prevented a recovery. On page 305 of the opinion the reasons for the rule are given by citations from *Cooley on Taxation*. The theory was, following the common-law rule, that a mistake of law in payment would leave the person who paid without a remedy. The decision in the *Guerra* case was made on the assumption, without discussion, that the common-law rule was applicable in Puerto Rico, and without any consideration of Section 1796 [later renumbered 1795] of the Civil Code, a matter which we reviewed in *Arandes v. Baez*, 20 P. R. R. 371.”

It is argued that because the Legislature in adopting Section 3226 R. S. omitted the addition of the words “but

such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress" it was intended that no suit should be brought unless there had been payment under protest or duress.

But the Legislature *did* intend to require payment under protest as a condition precedent in the case of a deficiency assessment and expressly so provided (Sec. 76 (a)). Obviously by the time the taxpayer had fought his case through the Board of Review and Equalization, he knew when he paid the tax whether or not he intended to contest by suit. If the Legislature had intended to require protest at the time of payment as a condition precedent to bringing suit to recover an *overpayment*, it is more logical to assume that it would have expressly so provided, rather than rely on an inference from an omission in copying the Federal statute which very few taxpayers had ever even heard of.

Furthermore, as the law stood in Puerto Rico at the time the legislation was enacted, protest was not a condition precedent (Civil Code Sec. 1795 (*supra*)), *South Porto Rico Sugar Company v. Treasurer* (*supra*), and the Supreme Court had so held under the 1919 Act. *Serralles v. Treasurer* (*supra*).

Why expressly negative a condition which did not exist?

Section 3226 of the Revised Statutes, was a general statute, not confined to income taxes but covered the whole field of internal revenue and customs. It was in the latter classes of cases that the rule of payment under duress and protest had been rigidly enforced.

This court held even prior to the amendment to R. S. 3226 in 1924 dispensing with protest, that protest was not required as a condition precedent to suit to recover overpayments of taxes when the law imposes the mandatory duty to refund.

United States v. Hvoslef, *supra* (1915);

United States v. Jones, 236 U. S. 106 (1914).

And it has been so held under Federal income tax legislation similar to the Puerto Rican Act of 1924.

Greenport Basin & Construction Co. v. United States (supra);

Hyatt Roller Bearing Co. v. United States (supra).

The cases cited by this petitioner (brief 23) involve principles of the common law which never were applicable in Puerto Rico.

United States v. Cuba Mail S. S. Co., 200 U. S. 488, was a case involving the refund of money paid for revenue stamps which the court decided on the authority of *Chesbrough v. United States*, 192 U. S. 253, a similar case also cited by petitioner and which was distinguished in *South Porto Rico Sugar Company v. Bonner* (supra); *Little v. Bowers*, 134 U. S. 547 involved New Jersey real estate tax and was decided on the ground that the tax had been paid under a compromise and there was therefore no controversy. *Elliott v. Swarthout*, 10 Pet. 137, and *Curtis Admx. v. Fiedler*, 2 Black 461 were both customs cases brought personally against the collector on assumpsit and strictly applied the common law principles applicable to assumpsit; *Moore Ice Cream Co. v. Rose*, 289 U. S. 374, although an income tax case held that the amendment to R. S. 3226 in 1924 excusing protest applied to cases arising under previous income tax acts and does not conflict with the opinions we have cited above. The opinion points out that the amendment was adopted to correct an injustice—an injustice which will be introduced in Puerto Rico for the first time if the decision of the Supreme Court in this case is allowed to stand.

SIXTH.

The Treasury regulations.

Following the adoption, on August 6, 1925, of the Income Tax Law of 1924, the Treasurer on May 17, 1926, approved Regulations as provided by the Act. The pertinent article (355) which, in the printed regulations, immediately follows a copy of Section 76 of the Act, is printed in Appendix A (57).

There were no interpretations of the Section 76 (b) of the Act by the Supreme Court until much later, so that the Treasurer had for his guidance only the Act itself, the decision in *Serralles v. Treasurer* (supra) under the 1919 Act, and decisions of this court under R. S. 3226.

The Regulation 355 provides that *when the taxpayer receives notice from the Treasurer that the income tax has been determined* he may make a voluntary payment, without appealing to the Board, file a claim for credit or refund with the Treasurer within four years of payment, and if the claim is denied bring an ordinary action. This obviously is inaccurate language, and it is argued that the Regulation therefore can have no application.

While the 1919 Act provided for payment only *after* a determination by the Treasurer, and the 1924 Act provided for payment on a fixed date without the necessity of a determination, nevertheless the 1924 Act does provide specifically for an examination of the return upon filing, a *determination* of the amount of the tax, a notification of underpayment and a refund of overpayments (Secs. 54 and 55 Appendix A) and it became the practice and still is on the part of many taxpayers (although there is under no authorization therefor under the law) to file a return without payment well in advance of the payment date, obtain an examination before the payment date, and pay on the basis of the Treasurer's determination. The practical effect was and is to obtain

the advantage of a ruling by the Treasurer before payment, substantially the same as under the 1919 Act.

The essential point in the Regulation, however, is that it provides that upon filing a claim for credit or refund and denial thereof by the Treasurer, the taxpayer may bring an ordinary action.

We submit that this was a fair interpretation of Section 76 (b), taken in conjunction with Section 64 (c), in view of the *Serralles* case, if the Treasurer was warranted in regarding Section 76 (b) as a substitution for the second paragraph of Section 66 of the 1919 Act, as we think he was.

Regulations which had stood and been relied on for many years without being questioned should at least have received serious consideration, and, unless obviously in violation of the express provisions of the statute, should have been sustained. *United States v. Morehead*, 243 U. S. 607; *Tyson v. Commissioner*, 68 F. (2d) 584 (cert. denied 292 U. S. 657). Instead of doing so the Supreme Court has ignored not only the regulations but the provisions of the law Sec. 76 (b) upon which they were based.

The contention of petitioner that the regulations refer only to deficiency assessments, and that they are a hang-over "from the 1921 Legislation," is answered by the fact that they cover claims for credit and refund which can only refer to the only claims for credit and refund covered by the 1924 law, namely claims for credit or refund of overpayments, and by the fact that nowhere under the 1921 Act is there any mention of or provision for claims for credit or refund.

Whether or not the Treasurer applied these regulations, they were never revoked and taxpayers at least were justified in assuming that they were in force and in giving them the interpretation which they reasonably appear to bear. Otherwise their only effect would be to mislead the taxpayer.

SEVENTH.

The power of the Board of Equalization to determine the facts.

The Board of Review and Equalization is a creature of the Political Code, and not of any special law. It is the administrative board set up to hear, review and adjust decisions of the Treasurer on tax matters in general. Its functions are not confined to income taxes. Its powers as to income tax are defined as follows:

“To fix the income tax of any taxpayer; and upon recording such determination, the Board shall correct returns, and liquidate taxes to be levied on income returns filed, in accordance with its decision, and shall report the facts to the Department of Finance for such corrections, cancellations or issuance of receipts as may be proper. Said Board shall have power to strike out, lessen or increase the valuations made in any schedule returned to it, whether or not complaint has been made in connection therewith, and to decide all other complaints in regard to the levying of property and income tax, and to correct all errors as such errors are brought to its attention.”
Section 310 of Political Code as amended by Act No. 75 of August 2, 1923.

There is no general repealing clause in the Income Tax Law of 1924, although the Law of 1921 is expressly repealed. Provisions of the fundamental laws of Puerto Rico, embodied in the codes, are not repealed by implication.

On the contrary, section 67 of the Income Tax Law of 1924 expressly provides:

“Section 67.—All administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act.”

The sections of the Political Code above quoted fall under the title “Assessment of Property.”

The Income Tax Law of 1924 provides no procedure before the Board of Review, nor for the scope of review, nor for the manner in which the Board is to be constituted, although it does provide for appeals to the Board. If the procedure before the Board and the scope of its review are not defined by the sections of the Political Code above referred to, then there is no legislation on this subject.

The income tax law determines that an appeal to the Board of Review and Equalization is required in certain cases. The income tax law stops there. The procedure and scope of the review on appeal, whenever required, is defined by the Political Code and is the same whether the matter comes before the Board on a deficiency assessment or on a claim for credit and refund. The task of the Board in determining the tax is no different in one case than in the other.

If petitioner's contention were correct, every time a tax law is enacted covering a new situation and providing for an appeal to the Board, the Political Code would have to be amended to give the Board jurisdiction.

Assuming, therefore, that the appeal to the Board in this case was authorized by the Income Tax Law, the Board was entirely within its proper functions in fully reexamining the return and readjusting the tax. The Board did this not only once but twice. After the first determination the Treasurer had full opportunity to re-study the matter which he presumably did, and to present his case to the Board on the second appeal. However, when the Board re-affirmed its decision on the second appeal the Treasurer should have complied with the ruling. When he did not do so and the taxpayer brought suit the ruling in his favor by the Board at least established a prima facie case in his favor without more, and shifted the burden to the Treasurer, whose remedy as to the merits was by answer setting up the grounds wherein he deemed the Board to be in error rather than by demurrer.

Moreover, as we have stated above (p. 2), the question as to the sufficiency of the statement of facts was not passed upon in any court below and should not be heard for the first time in this court.

EIGHTH.

The function of the court in suits against the Treasurer for the recovery of taxes.

The courts in Puerto Rico have jurisdiction to investigate the facts on the merits and are not bound by any finding of the facts by the Treasurer or the Board of Review and Equalization. It is a trial de novo. The principle is the same whether the matter arose originally out of a deficiency assessment or an overpayment, as in both cases the matter has already been passed upon by an administrative official or body.

Although Section 54 of the Act directs the Treasurer to make a determination of the tax, neither in this section nor elsewhere in the Act, is his determination declared to be final or conclusive. Even if it did so provide, his determination would be subject to judicial review. *United States v. Laughlin* (supra). But, since the law did not provide that the determination is final or conclusive, the court has jurisdiction to re-examine and redetermine the facts.

The matter is fully discussed by the Supreme Court in *Porrata v. Domenech*, 51 D. P. R. 215. As the case is not reported in English, we will summarize it at length.

The plaintiff had sold a farm which she had owned since prior to March 1913. The Treasurer notified taxpayer of a deficiency for the year in which the farm was sold. Taxpayer had paid the deficiency as reduced by the Board and brought suit to recover. The lower court found as a fact that the property was worth \$25,000 more in 1913 than the Board had determined, and directed that a new liquidation be made of the tax and that the amount erroneously col-

lected be returned to the taxpayer. The Supreme Court said:

"The defendant contends that since what is involved is a conclusion of fact reached by the Board from an examination of evidence and in the exercise of its powers, such conclusion cannot be altered by the district court.

"We believe that the Legislature in establishing the remedy authorized by section 76 of Act #74 of 1925 (Income Tax Act of 1924) conferred upon the courts the jurisdiction necessary for an investigation and decision upon all questions included therein properly submitted to them. One of these questions is undoubtedly the valuation of the property when that valuation serves as in this case, as the basis for imposing a tax.

"The property in question was assessed for the year 1913 for the purpose of property taxes at \$19,000, and that was the valuation which the Treasurer took as a basis for the imposition of a tax. On the appeal to the Board, that body in accordance with the statute which provides that the basis for the calculation must be the cost or the fair market value of the property on March 1, 1913 (see sections 5 and 6 of Act. No. 74 of 1925), fixed the value of the property at \$40,000, that is, at \$300 per acre.

"What procedure did the Board follow? We do not know. On what evidence did it base its conclusion? The defendant has repeatedly insisted that the evidence offered in court was the same as that submitted to the Board, but we have found nothing in the record to support this. We believe that in a case of this kind the defendant must offer the evidence necessary to permit the district court to enter a proper judgment."

The rule is the same under the Federal Statute. Referring to the procedure under R. S. 3226 this Court said in a case involving the limitation of the time within which suit can be brought:

"It is certain that by the amendments to Section 252 and Section 3226 Rev. Stats. by the Act of March

4, 1923, C. 276, 42 Stat. 1504, the complainant is given the right now to pay the tax and sue to recover it back, and in such a suit to raise the questions as to the value of the stock and the amount of the resulting tax and also as to the bar of time against its assessment which he attempted to raise in the bill." *Graham v. Du Pont*, 262 U. S. 234, 258.

The only distinction between the above cases and the present case in so far as pleadings are concerned is that here the taxpayer is not seeking to controvert, but to *sustain* the ruling of the Board which in the absence of any allegations to the contrary should be presumed to be correct. This places the burden of attack on the Treasurer.

NINTH.

The decision of the Supreme Court of Puerto Rico was clearly erroneous.

The decision in this case is based on the following previous decisions:

(1) The decision of the court in *Porto Rico Fertilizer Co. v. Domenech*, expressed in three opinions, two of which were on reconsideration, and which for the convenience of the court are attached hereto as Appendix B. That case was heard and decided jointly with the present case in the Circuit Court of Appeals. The only difference between the two cases is that in the *Porto Rico Fertilizer* case there had been no appeal to the Board of Review and Equalization, which the Circuit Court considered sufficient basis for affirmance.

(2) The decision of the Supreme Court in *Compania Agricola de Cayey, Ltd. v. Domenech*, 47 D. P. R. (Spanish) 535 decided in 1934.

While the petitioner calls attention to two respects in which the decisions conflict, he insists that there is no conflict on the points herein involved (Brief 36 footnote).

The only basis for petitioner's conclusion that there is no conflict is that the court approved its previous decision in *Compañía Agrícola de Cayey, Ltd. v. Domenech* (supra).

Consistency with its previous decision is not an essential criterion for determining whether or not the court was clearly erroneous. The court might, and we maintain did, persist in a patent misconception of the statute.

The court, however, not only misconstrued the statute, but its decisions in these cases are in conflict with its two previous decisions in *Serralles v. Treasurer*, 30 P. R. R. 220, and *McCormick v. Bonner, Treasurer*, 44 P. R. R. 432 (Spanish) decided in 1933. The only explanation the court gives is that the previous statute had been repealed (Appendix B 73). This is not sufficient reason for failing to follow applicable principles of jurisprudence already established.

In the *Serralles* case, as we have already pointed out (p. 8) decided under the 1919 Act, the court held that under Section 66 of the Act a suit could be brought to recover a voluntary overpayment, made without protest. No affirmative provision of the 1919 Act excused protest. In fact the Act provided a procedure for appeal to the Board and payment under protest in every case.

The only possibly statutory basis for suit without appeal and protest under the 1919 Act was the second paragraph of Section 66 which neither requires or excuses protest. (See supra p. 20 and Appendix A). Dispensing with protest in the *Serralles* case could only have been warranted on the ground that the Civil Law in Puerto Rico which corresponds to the common law on the Continent does not require protest. That such is the law had been pointed out by the court in *South Porto Rico Sugar Company v. Treasurer* (see supra p. 21).

The court reiterated its holding in the *Serralles* case in *McCormick v. Bonner, Treasurer* (supra), (Spanish) in the following language (our translation except for the quotation from the *Serralles* case which is the original English):

“The People of Puerto Rico called our attention to the fact that the taxes were paid voluntarily and

without any protest, that appellants permitted a year to pass without requesting their return and that the complaints were not filed until 1923."

(Here the court copies Sections 63 and 66 of the Act of 1919, see Appendix A 44).

"In this respect we said in *Serralles v. Treasurer*, 30 D. P. R. 237, 240 (30 P. R. R. 229, 223):

'The appellee insists that the complaint does not adduce facts sufficient to constitute a cause of action. He alleges that in addition to Section 66 of Act. No. 80 of 1919, sections 61, 62 and 63 thereof are also applicable, and that inasmuch as it is not alleged in the complaint that an appeal was taken to the Board of Review and Equalization, or that the tax was paid under protest, the plaintiff has no right of action.

'We do not entertain this view. It is true that Section 66 prescribes that the action shall follow the procedure authorized and the proceedings established by Section 63, but this clearly refers to the time within which to bring the action, to the title of the complaint and to the manner of prosecuting the action in court, all of which is to be found in Section 63, and it is not necessary to supplement the intent of the legislators by the provisions of sections 61 and 62. Clearly the cases are different. The law is liberal and affords ample opportunities for correcting any error or repairing any injustice; first, when the taxpayer takes the first step and, second, when after the tax is levied and collected without difficulty or protest the taxpayer requests the refund of what in his opinion was unlawfully collected from him.'

"This case clearly serves as authority for the fact that it is not necessary to appeal to the Board of Review and Equalization nor pay under protest."

It is significant that Section 63 of the 1919 Act referred to, is almost identical with Section 76 (a) of the 1924 Act except for provisions with respect to reconsideration with which we are not concerned, and that in both Section 63 of the 1919 Act and Section 76 (a) of the 1924 Act payment

under protest is required after the decision of the Board. Yet the court held in the *Serralles* case and in the *McCormick* case that the Section did not require protest in the case of return of voluntary overpayments and in this case and the *Porto Rico Fertilizer* case held that it does require protest.

Furthermore, the liberal policy expressly recognized under the 1919 Act is substituted by a narrow policy, although the 1924 Act returned to the liberal policy of the 1919 Act in even more emphatic terms after discarding the narrow policy of the 1921 Act.

There appear to be no cases under the 1921 Act except *Compania Agricola de Cayey v. Domenech* (supra), decided in 1934, which involves taxes paid under the 1921 Act and procedure of the 1924 Act. The sum of \$352.57 was involved and the case, therefore, was not appealable to the Circuit Court. It is not reported in English. The taxes involved had been paid for the years 1921, 1922 and 1923, when the 1921 Law and not the 1924 Law was in force. The suit was to recover an overpayment. The opinion quotes Section 64 of the 1924 Act (Appendix A 52); and states that it did not appear that the taxes had been paid under protest or that the decision of the Treasurer had been appealed to the Board. The court said (our translation):

“Now, then, the 1919 Law (No. 80, p. 613) gave the taxpayer directly the right to bring suit upon the failure of the Treasurer to return the taxes, whether they had been paid under protest or not. The subsequent 1921 Law eliminated the substantive right to apply to the Treasurer independently, *but the question arises whether that part of the law which subjects the Treasurer to suit was likewise repealed*. In other words, the Legislature in 1919 said that the Treasurer might be sued to collect taxes which had been paid previously by the taxpayer. The final provision of the 1921 Law repealed all laws inconsistent therewith, *but the question to be decided is whether that part of the law which granted the remedy was also repealed*. We have come to the conclusion that it was.

"It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. *The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by suit also disappeared.* From 1919 on the payment under protest was an express condition preliminary to the initiation of a lawsuit. Though the law of 1919, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the return of the taxes could be obtained. And such was the general understanding. We have before us an illustrative chart prepared by the Economic Commission of the Legislature containing the laws now in force, and the law of 1919 is omitted therefrom. Generally, though the time elapsed is not so long, taking into consideration the contemporary construction, the law of 1919 is no longer in force. Therefore, though the law of 1925 (1924) granted the substantive right of filing appeal with the Treasurer, even if the taxes were not paid under protest, said law did not keep in force or revive the remedy granted by the law of 1919." (Italics supplied).

Obviously, the attention of the court was concentrated solely on a situation arising under the 1921 Law, under which the taxes had been paid and not on taxes payable under the 1924 Act, or the procedure which should apply thereto. This opinion should have been interpreted in the light of the matter before the court. Regulation 355 (supra p. 24), under the 1924 Act, was not referred to or discussed, nor did the relationship between the second paragraph of Section 66 of the 1919 Act and Section 76 (b) appear to have been considered.

With this background we come to the opinions in this case and the three opinions of the Supreme Court in the *Porto Rico Fertilizer* case.

The opinions in the present case rest squarely on the opinions in the *Fertilizer* case and on *Compañía Agrícola de Cayey, Ltd. v. Domenech* (supra). Reference is also made

to the decision of this court in *Little v. Bowers*, 134 U. S. 54, to the effect that voluntary payments in the absence of statute cannot ordinarily be recovered.

It is first stated that this is a discretionary matter (R. 21). As we have pointed out above, Page 12, this is clearly erroneous as the statute is worded in mandatory terms, and in this all three judges of the Circuit Court of Appeals and the petitioner agree. Furthermore, the basis for concluding that the matter is discretionary is the wording of Section 75 of the Act (Appendix A 53) in which it is provided that the Treasurer is *authorized* to remit, etc. The court entirely overlooks the mandatory provisions of Sections 55 and 64 (Appendix A 50, 52), and ignored the fact that under the 1919 Act the same language was clearly mandatory, the only difference being that the authorization for suit in that case appears in the second paragraph of Section 66, whereas under the present Act it appears in Section 76 (b). Having made this error, the conclusion is readily understandable. Obviously, there is no recourse to the courts to control the discretion of an administrative officer.

With respect to the necessity of protest, the opinion is based on the decision in *Compañia Agricola de Cayey, Ltd. v. Domenech* (supra), which we have discussed above, and it is said that protest is made a condition precedent by legislative enactment (R. 21). The only possible legislative enactments on the subject, as we have seen (supra p. 19), are Section 76 (a), which all three judges of the Circuit Court and the petitioner (Brief 25) concede has no application whatever to overpayments, and Act No. 8 of 1927, which is general tax legislation, and which the court itself held, reversing a former decision, has no application to income tax matters covered by the 1924 Act.

The only explanation of the holding that protest is required by legislative enactment is that the court, following the *Porto Rico Fertilizer* case, erroneously considered the matter to be controlled by Section 76 (a).

A study of the three opinions in the *Fertilizer* case (Appendix B 62 to 78) conclusively demonstrates this. The District Court had sustained the demurrer on the ground that payment had not been made under protest as required by Section 76 (a). The first opinion in the *Fertilizer* case (Appendix B 62), after summarizing Sections 76 (a) and 76 (b), concludes that the meaning of these subdivisions is that the tax shall be paid under protest before refund can be obtained and that suit against the Treasurer shall be filed within a year, but that "said proceeding shall not be maintained in any court unless, *after payment under protest*, a claim for refund shall have been duly filed with the Treasurer and with the Board of Equalization on appeal." (Appendix B 64).

What the court did was to take the words "after payment under protest" out of Section 76 (a) and insert them in Section 76 (b), obviously under the impression that both sub-sections covered the same subject matter (Appendix B 64).

In the second opinion (Appendix B 65 to 77), the court states, "The taxpayer is called upon to render his income tax return and, as soon as practicable after the filing of said return, the Treasurer of Puerto Rico shall examine the same and determine the exact amount of the tax", and then proceeds to discuss *deficiency* assessments.

This indicates a fundamental misconception on the part of the court. The language above quoted sets forth the procedure under the 1919 and 1921 Acts. What the court fails to say, and could not have had in mind, was that the taxpayer must *pay his tax* on or before the final date for filing of the return, and that the examination of the Treasurer comes *after* rather than *before* payment.

The court then refers to Section 75 (a), quotes Section 76 (b), and asks and answers the following question:

"Does this subdivision (b) mean that after the Treasurer denies the claim and said denial is af-

firmed by the Board a claim for refund has to be filed and if the Treasurer refuses it appeal again to the Board in order to be able to resort to the courts of justice?

“Such is the meaning, at first glance, of the terms of the law itself, and we so decided in the opinion rendered as grounds for the judgment which was made ineffective by the order of January 14th, last.

“Nevertheless, a careful consideration of the matter carries us to the conclusion that it is not possible that such was the intent of the Legislator. Why such duplicity? (sic) If the Treasurer denies and the Board affirms his denial and the taxpayer pays under protest, why resort again to the Treasurer and why appeal again to the Board?”

Obviously the court only had in mind and was concerned with the question as to whether, after the Board, as provided in 76 (a), has denied an appeal, the taxpayer must again file a claim for refund with the Treasurer before bringing suit, and the court of course concludes that this would be an unnecessary formality. This demonstrates that the court had in mind that Section 76 (b) referred only to the situation covered by 76 (a) and apparently did not consider or investigate the proposition that Section 76(b) covers claims for refund or credits of overpayments and is the section which authorizes suit in the matter of claims for credit and refund of overpayments, and in effect is a substitution in the 1924 Act for the second paragraph of Section 66 of the 1919 Act.

The conclusion of the court is that “when the taxpayer, feeling aggrieved by the income ~~tax~~ *levied* by the Treasurer, files his claim with said official, and his claim is denied and he appeals to the Board, which also decides the case against him, and *he then pays under protest*, he may, within the term of thirty days fixed by law No. 74 of 1925, Section 76, first paragraph, resort to the courts of justice without any

other preliminary requisite, that is, without having to file a petition for refund with the Treasurer and without having to appeal again to the Board of Review and Equalization." (Appendix B 71). (*Italics supplied.*)

The court throughout is discussing a situation with which this case is not in the slightest concerned and entirely confuses the procedure where there is a deficiency with the procedure where there is an overpayment.

The court then proceeds to discuss *Compañia Agricola de Cayey, Ltd. v. Domenech* (*supra*), quoting from the latter part of the opinion above quoted, and fails to note that the matter under discussion was taxes paid under the 1921 Act, which contained no provision similar to the second paragraph of Section 66 of the 1919 Act or Section 76 (b) of the 1924 Act, and on which point the court in that case obviously had its attention concentrated.

The *Serralles* and *McCormick* cases are summarily dismissed in three lines, on the ground that they are not applicable because they are based on the Repealed Law of 1919 (Appendix B 73). It apparently did not occur to the court that the principles of those cases might be applicable under the 1924 Act, which reinstated the right to recover overpayments which had existed under the 1919 Law.

The Court continues with an entirely separate problem and reverses its previous holdings in *American Colonial Bank v. Domenech*, 43 D. P. R. 889, and *Soto Gras v. Domenech*, 45 D. P. R. 940, to the effect that under a general law (Law No. 8 of 1927) suit might be brought within one year after payment, and held that suit must in every case be brought within thirty days as provided in Section 76 (a). This change of ruling was due to the conclusion finally arrived at that the income tax law was a complete law in itself and was not controlled by a subsequently enacted general law. It further demonstrates that the court had in mind that this situation is covered by Section 76 (a).

It is interesting to note on this point, although it is not involved in this case, that the theory of *American Colonial*

Bank v. Treasurer (supra), holding that Law No. 8 of 1927 governed the time within which to bring suit, rather than the Income Tax Law of 1924, was recognized by the Circuit Court of Appeals although with considerable hesitance in *Domenech v. Verges*, 69 Fed. (2d) 714, and that the Supreme Court in this case proceeded to reverse itself in spite of the approval of its former ruling by the Circuit Court of Appeals.

The opinion on the second reconsideration merely involves the question as to whether the Supreme Court should be allowed to reverse itself on the question as to the time within which to bring suit, in the face of the recognition of its previous decision by the Circuit Court of Appeals (Appendix B 77).

The court (R., 21) in its opinion in this case cites *Little v. Bowers*, 134 U. S. 54 (a case involving New Jersey Real Estate tax) for the proposition that taxes voluntarily paid in the absence of a statute authorizing it cannot "ordinarily" be recovered. Although this is an accurate statement of the common law, the court overlooked the fact that the common law is not in force in Puerto Rico and failed to realize that while this is the rule "ordinarily" at common law, the rule does not apply even at common law if the manifest purpose and scope of the legislation indicate that no protest is necessary. *United States v. Hvoslef* (supra) and that even in jurisdictions where the common law rule governs "in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as the authority to decide is given to the administrative officer". *Dismuke v. United States* (supra). The court also failed to note that what was really held in the *Bowers* case was that there had been a payment upon compromise and therefore there was no controversy.

The opinion of the Supreme Court of Puerto Rico was clearly erroneous in holding that this was a discretionary

matter; that it is governed by Section 76 (a) of the Act and therefore requires payment under protest; in failing to give effect to Section 76 (b), which under the rulings of this court and its own ruling under the 1919 Law involving a similar section, authorizes suit and establishes as the only condition precedent thereto that a claim for credit or refund shall have been filed with the Treasurer of Puerto Rico.

TENTH.

The judgment of the Circuit Court of Appeals for the First Circuit should be affirmed.

Washington, February 25, 1939.

Respectfully submitted,

EARLE T. FIDDLER,

Attorney for Respondent.

ANDREW KIRKPATRICK,
HERBERT S. McCONNELL,
Of Counsel.

APPENDIX A

Statutes.

Sections of the Puerto Rican Income Tax Act of 1919. Law No. 80 of June 26, 1919.

INCOME RETURNS.

INDIVIDUAL RETURNS.

Section 34.—That every person having a gross income for the taxable year of one thousand (1,000) dollars, or over, if single, or if married and not living with husband or wife, or of two thousand (2,000) dollars or over if married and living with husband or wife, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed by this Act. If a husband and wife living together have separate incomes of two thousand (2,000) dollars or over, each shall make such a return unless the income of each is included in a single joint return. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or attorney-in-fact or by the guardian or other person charged with the care of the person or property of such taxpayer.

CORPORATION RETURNS.

Section 37.—That every partnership, association or corporation whether or not exempt from the payment of the income tax shall make a return, stating specifically the items of gross income derived within the taxable year and the deductions allowed by this Act.

The said return shall be subscribed and sworn to by one of the managing representative partners or attorneys in the case of partnerships, and in the case of associations or corporations by the president, vice-president, or other principal officer and by the treasurer or assistant treasurer. If any American or foreign corporation, association or partnership has no office in this Island, the return shall be made by its agent or legal representative. In cases where trustees, trustees in bankruptcy or receivers or other persons who are legally in charge of the administration of the property or business of a corporation, such persons shall make returns for such corporations.

TIME FOR FILING RETURNS.

Section 39.—That returns referred to in the preceding sections shall be made to the Treasurer of Porto Rico before the first day of March of each year, or within the sixty days subsequent to the termination of the legal business year; *Provided*, That returns made for the calendar year 1918 may be used by the Treasurer for the liquidation and collection of the tax hereby levied, but the Treasurer may require new returns whenever advisable and necessary for the purposes of said liquidation; *Provided, further*, That returns to be rendered of income accruing during the calendar year 1918 shall be in the hands of the Treasurer before August 1, 1919.

LEVY AND COLLECTION OF TAX.

Section 54.—That the taxes imposed by this Act shall be computed and collected by the Treasurer of Porto Rico, and save as provided by Section 17 of this Act such taxes shall be paid in two installments each one equal to one-half of the amount of the tax. The first installment shall be paid to the Treasurer of Porto Rico within the thirty days following the day on which the payer is notified of the amount of the tax, and the second and last installment shall be paid to the Treasurer of Porto Rico in no case later than

six months after receipt of the original notice by the taxpayer, except in case of the reconsideration provided for in Section 58.

PROCEDURE FOR LEVYING THE TAX.

Section 57.—That the Treasurer, pursuant to the return made by taxpayers and pursuant to such additional reports as he may require, balances and inventories and investigations by him made, shall determine the net income of each taxpayer and shall compute the amount of the tax that shall be paid by said taxpayer, and it shall be his duty to notify the taxpayer or his legal representative as to both such items.

Section 58.—Where a taxpayer is not agreed to the decision of the Treasurer he may, within the fifteen days following notice of such decision, whether such notice is served by agent or by mail, apply in writing for the reconsideration of the case, producing all such evidence as he may deem pertinent and such as may be required by the Treasurer.

Section 59.—That if the proper investigation is made the Treasurer believes that there is just cause for granting a reconsideration, he shall do so and shall determine the amount of the net income in accordance with the new evidence produced, giving notice thereof to the taxpayer. Where the Treasurer believes that the petition for reconsideration is not well founded, he shall dismiss the same with notice to the interested parties.

Section 60.—That where a taxpayer does not ask for a reconsideration within the term fixed, or where the Treasurer, after admitting the petition for a reconsideration, shall have again determined the net income and computed the amount of the tax, as petitioned by the taxpayer, the decision of the Treasurer shall be final and no appeal shall lie therefrom, and the tax so levied shall be paid within the time prescribed in Section 54 hereof.

Section 61.—That where the Treasurer dismisses a petition for reconsideration, or where he modifies his first decision though not in terms prayed for by the taxpayer, such taxpayer may, within fifteen days following the notification of such decision, appeal to the Board of Review and Equalization created by law, alleging in writing and under oath the facts upon which he bases his claim and the reasons of law in support thereof.

Section 62.—That the Board of Review and Equalization shall fix the day and hour for the hearing of the case, at which hearing evidence shall be introduced and the argument of the appellant shall be heard. All powers vested under this Act in the Treasurer to summon witnesses, require the production of books and documents, strike balances and take inventories, and make investigations, are hereby conferred upon the Board of Review as to such cases as may be submitted thereto for its consideration.

Section 63.—That the decisions of the Board of Review and Equalization shall be final. In such cases the taxpayer shall pay the tax imposed upon him, within the time fixed in Section 55, under protest, and he may interpose within ten days following such payment under protest, a sworn complaint against the Treasurer of Porto Rico and before a court of competent jurisdiction. Said cases shall be given preference and priority on the calendars of the courts, and all defenses against the complaint to be offered by the defendant shall be made at one time and in one bill, and the judge shall decide then at one sole hearing in strict order of precedence. The trial shall be promptly set for final decision and any unwarranted delay on the part of the plaintiff shall be sufficient grounds for a judgment of dismissal.

REFUND OR ABATEMENT OF TAXES.

Section 66.—That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected.

as well as of the amount of any fine collected by error or without legal authority therefor.

That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act.

Section 67.—That should any taxpayer pay taxes in excess of the amount properly due, the amount of the excess shall be credited against any income tax due from the taxpayer, and the remaining balance, if any, shall be reimbursed him.

**Sections of the Puerto Rican Income Tax Act of 1921.
Law No. 43 of July 1, 1921.**

ASSESSMENT AND COLLECTION OF TAX.

Section 38.—That the taxes imposed by this Act shall be assessed and collected by the Treasurer of Porto Rico, and shall be paid in four quarterly installments each one equal to one-fourth of the amount of the total tax. The first installment shall become due and be paid within fifteen days following the day on which the taxpayer is notified of the amount of the tax, and all others within the first fifteen days of the corresponding quarter.

PROCEDURE FOR LEVYING THE TAX.

Section 41.—As soon as the Treasurer of Porto Rico receives an income return he shall levy and collect such tax as the taxpayer may owe in accordance with his own return.

VERIFICATION OF RETURNS.

Section 42.—As soon as possible the Treasurer of Porto Rico shall verify the income returns by making a study of the returns rendered by the taxpayers, and of such additional returns as he may require, and of balances or inventories, and by means of such investigations as he may make and he shall determine the net income of each taxpayer and shall compute the tax due by each, and shall serve notice of both things on the taxpayer or his legal representative.

Section 43.—If the amount due by a taxpayer as shown by the aforesaid investigation is greater than the amount paid under Section 41, the difference shall be paid to the Treasurer of Porto Rico within a period of fifteen days after proper notice shall have been mailed.

Section 44.—If the return has been made in good faith and the understatement of the tax is not due to any fault of the taxpayer there shall be no penalty or additional tax added, but interest shall be charged on the amount of the deficiency at the rate of one-half ($\frac{1}{2}$) per cent per month.

If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five (5) per cent of such deficiency and in addition thereto interest at the rate of one-half ($\frac{1}{2}$) per cent per month.

If the return is made false or fraudulent with intent to evade the tax, the tax on the additional income discovered to be taxable shall be double and an additional one (1) per cent per month shall be added.

The interest provided for in this section shall in all cases be computed upon the levying of the tax.

If the amount of tax due as computed shall be less than the amount paid, the difference shall be refunded to the taxpayer by the Treasurer of Porto Rico in accordance with the procedure provided by law.

APPEALS TO BOARD OF REVIEW.

Section 45.—When a return made by a taxpayer is modified by the Treasurer of Porto Rico, and such taxpayer does not concur in said officers' decision, such taxpayer may appeal to the Board of Equalization and Review created by law, within the fifteen days following service of notice of said decision, whether the same is served by an agent or by mail, alleging in writing, under oath, the facts on which the claim is based and the legal principles adduced in its support.

Section 46.—That the Board of Review and Equalization shall fix the day and hour for the hearing of the case, at which hearing evidence shall be introduced and the argument of the appellant shall be heard. All powers vested under this Act in the Treasurer to summon witnesses, require the production of books and documents, strike balances and take inventories, and make investigations, are hereby conferred upon the Board of Review as to such cases as may be submitted thereto for its consideration.

Section 47.—That the decisions of the Board of Review and Equalization shall be final. The taxpayer shall pay the tax imposed upon him, within the time fixed, under protest, and he may interpose within twenty days following such payment under protest, a proper complaint against the Treasurer of Porto Rico and before the proper district court. Said cases shall be given preference and priority in the calendars of the courts, and all defenses against the complaint to be offered by the defendant shall be made at one time and in one bill, and the judge shall decide then at one sole hearing in strict order of precedence. The trial shall be promptly set for final decision and any unwarranted delay on the part of the plaintiff shall constitute sufficient ground for a judgment of dismissal.

FINAL PROVISIONS.

Section 63.—That all laws or parts of laws in conflict herewith are hereby repealed; but the provisions thereof shall continue in force as regards the levying and collection of all taxes accrued thereunder, and for the levying and collection of all fines imposed or that may be imposed in connection with said taxes.

Provisions of the Income Tax Act of 1924. Act of No. 74 of Aug. 6, 1925.

TIME AND PLACE FOR FILING INDIVIDUAL AND FIDUCIARY RETURNS.

Section 27.—(a) Return (except in the case of non-resident individuals not citizens of Puerto Rico) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March

TIME AND PLACE FOR FILING CORPORATE OR PARTNERSHIP RETURNS.

Section 39.—(a) Returns of corporations or partnerships shall be made at the same time as is provided in subdivision (a) of section 27, except that in the case of foreign corporations not having any office or place of business in Puerto Rico returns shall be made at the same time as provided in section 27 in the case of a nonresident individual not a citizen of Puerto Rico.

PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES DATE ON WHICH TAX SHALL BE PAID.

Section 53.—(a) Except as provided in subdivisions (b) and (c) and (d) of this section the total amount of tax imposed by this title shall be paid—

(1) In the case of a taxpayer, other than a nonresident individual not a citizen of Puerto Rico, and other than a foreign corporation not having an office or place of business in Puerto Rico, on or before the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on or before the fifteenth day of the third month following the close of the fiscal year; and

(2) In the case of a nonresident individual not a citizen of Puerto Rico, and of a foreign corporation not having an office or place of business in Puerto Rico, on or before the fifteenth day of June following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on or before the fifteenth day of the sixth month following the close of the fiscal year.

(b) (1) The taxpayer may elect to pay the tax in two equal installments, in which case the first installment shall be paid on or before the latest date prescribed in subdivision (a) for the payment of the tax by the taxpayer, and the second installment shall be paid on or before the fifteenth day of the sixth month after such date.

(2) If any installment is not paid on the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the Treasurer.

(c) (1) At the request of the taxpayer, the Treasurer may extend the time for payment of the amount determined as the tax by the taxpayer, or any installment thereof, for a period not to exceed six months from the date prescribed in subdivision (a) or (b) for the payment of the tax or an installment thereof. In such case the amount in respect of which the extension is granted shall be paid on or before the date of the expiration of the period of the extension.

(2) If the time for payment is thus extended there shall be collected, as a part of such amount, interest thereon at the rate of 6 per centum per annum from the date when such

payment should have been made if no extension had been granted, until the expiration of the period of the extension.

(3) In case of payment of the amount determined as a tax by the taxpayer or of any part thereof, for the calendar year 1924, or for a fiscal year ending in 1924 or 1925, the Treasurer may grant a reasonable extension of time in which to make such payment, whether or not the taxpayer makes application to that end.

(d) The provisions of this section shall not apply to the payment of a tax required to be withheld at the source under section 22 or 35.

EXAMINATION OF RETURN AND DETERMINATION OF TAX.

Section 54.—As soon as practicable after the return is filed the Treasurer shall examine it and shall determine the correct amount of the tax.

OVERPAYMENTS.

Section 55.—If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment the excess *shall be credited* against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of tax, the excess *shall be credited or refunded* as provided in section 64.

DEFICIENCY IN TAX.

Section 56.—As used in this title the term “deficiency” means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (*or collected without assessment*) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

Section 57.—(a) If, in the case of any taxpayer, the Treasurer determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 30 days after such notice is mailed the taxpayer may file an appeal with the Board of Review and Equalization, alleging in writing and under oath the legal facts and grounds on which such appeal is based.

(b) If the Board determines that there is a deficiency, the amount so determined *shall be assessed* and shall be paid upon notice and demand from the Treasurer. No part of the amount determined as a deficiency by the Treasurer but disallowed as such by the Board *shall be assessed*, but a proceeding in a district court of competent jurisdiction may be begun, *without assessment*, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 60 has expired.

(c) If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the *deficiency* of which the taxpayer has been notified shall be *assessed*, and shall be paid upon notice and demand from the Treasurer. . .

CREDITS AND REFUNDS.

Section 64.—(a) Where there has been an overpayment of any income or excess-profits tax imposed by this Act, or by Income Tax Act No. 59 of 1917, Income Tax Act No. 80 of 1919, and Income Tax Act No. 43 of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

When a payment has been made of any income or excess-profits tax under the Income Tax Act No. 43 of 1921, as amended, for the calendar year 1924, or for any fiscal year ending in 1925, the amount of such payment shall be credited to any income or excess-profits tax then owned by the taxpayer pursuant to the provisions of this Act or of the acts hereinbefore amended in this subdivision or any amendment thereof, and any balance of such excess shall be immediately reimbursed to the taxpayer.

(b) Except as provided in subdivision (c) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim, or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) If the invested capital of a taxpayer is decreased by the Treasurer, and such decrease is due to the fact that the taxpayers failed to take adequate deductions in previous years, with the result that there has been an overpayment of income or excess-profit taxes in any previous year or years, then the amount of such overpayment shall be credited or refunded, *without the filing of a claim therefor*, notwithstanding the period of limitation provided for in subdivision (b) has expired.

(d) Where there has been an overpayment of tax under section 22 or 35 any refund or credit made under the provisions of this section shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

(e) This section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

GENERAL ADMINISTRATIVE PROVISIONS LAW MADE APPLICABLE.

Section 67.—All administrative, special or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act.

RULES AND REGULATIONS.

Section 68.—The Treasurer is authorized to prescribe all needful rules and regulations for the enforcement of this Act.

REFUNDS.

Section 75.—The Treasurer is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to The Legislature of Puerto Rico at the beginning of each regular session of all transactions under this section.

LIMITATIONS UPON SUITS AND PROCEEDINGS
BY THE TAXPAYER.

Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as *shall have been levied on him within the time specified* and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Puerto Rico.

Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence and the hearing shall be set promptly for final decision. . .

If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case sufficient legal grounds and facts for applying again to the Board for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of Puerto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.

(c) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

GENERAL PROVISIONS.

REPEALS.

Section 85.—(a) Income Tax Law No. 43, approved July 1, 1921, as amended, is repealed as of January 1, 1924.

(b) The parts of Income Tax Law No. 43, approved July 1, 1921, as amended, which are repealed by this Act (except as provided in Section 63 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in Income Tax Law No. 43, approved July 1, 1921, as amended, of all taxes imposed by prior income or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may have accrued in relation to any such taxes. In the case of any tax imposed by any part of Income Tax Law No. 43, approved July 1, 1921, as amended, repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

Sections 3220 and 3226 of United States Revised Statutes as Amended by Federal Revenue Act of 1924. (See Sections 75 and 76 (b) of the Puerto Rican Act of 1924).

REFUNDS.

Sec. 1011. Section 3220 of the Revised Statutes, as amended, is reenacted without change, as follows:

“Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Sec-

retary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

LIMITATIONS UPON SUITS AND PROCEEDINGS
BY THE TAXPAYER.

Sec. 1014.—(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for a refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is

begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

Income Tax Regulations No. 1 Under the Income Tax Act of 1924.

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER.

(Here follows copy of section 76 of the Act).

Article 355—Suits, etc.

Article 355.—Suits for Recovery of Taxes Erroneously Collected.—Suit or proceeding for the recovery of any income or excess-profits taxes alleged to have been erroneously and illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected can be maintained by the taxpayer when the requirements of either of the following methods of procedure have been fulfilled:

(1) When the taxpayer receives notice from the Treasurer that the income tax has been determined, he may: (a) make a voluntary payment of the amount so determined without filing an appeal from the Treasurer's determination of the tax to the Board of Review and Equalization); (b) file a claim for refund or credit with the Treasurer within four years from the time the tax was paid (see section 64 (b)); (c) if the claim is denied by the Treasurer, the taxpayer may bring an ordinary action before a court of competent jurisdiction to recover the amount so paid.

(2) When the taxpayer receives notice of the determination by the Treasurer of the tax to be paid, he may: (a) file an appeal to the Board of Review and Equalization; (b) if the decision is adverse he may petition for a reconsideration within thirty days; (c) if the reconsideration is denied, he may pay under protest; (d) if payment has been made, he may file a claim for credit or refund with the Treasurer and with the Board of Review and Equalization; (e) within thirty days from the date of payment he may file a suit in the proper court to recover the amount paid under protest. See section 76 (a) and (b).

The preceding paragraphs of this article outline the only manner in which a suit may be brought by the taxpayer for the recovery of taxes erroneously or illegally assessed or collected, or penalties collected without authority, or any sums excessive or in any manner erroneously collected, and strict compliance with these provisions by any taxpayer bringing such suit or proceeding is required. No suit for the purpose of restraining the assessment or collection of any taxes shall be maintained in any court. The word "restraining" is used in its broad, popular sense of hindering or impeding, as well as prohibiting or staying, and the provision is not limited in its application to suits for injunctive relief. The prohibition of such suits can not be waived by any officer of the Government.

Section 76 does not affect any proceeding in court instituted prior to the enactment of the Act.

Sections 272 and 281 of the Federal Revenue Act of 1924.
(See Sections 55 and 64 of the Puerto Rican Act of 1924.)

OVERPAYMENTS.

Sec. 272.—If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments,

exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281.

CREDITS AND REFUNDS.

Sec. 281.—(a) Where there has been an overpayment of any income, war-profits or excess-profits tax imposed by this Act, the Act entitled “An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,” approved August 5, 1909, the Act entitled “An Act to reduce tariff duties and to provide revenue for the Government and for other purposes,” approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c) and (e) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) If the invested capital of a taxpayer is decreased by the Commissioner and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that there has been an overpayment of income, war-profits, or excess-profits taxes in any previous year or years, then the amount of such overpayment shall be credited or refunded, without the filing of a claim therefor, notwithstanding the period of limitation provided for in subdivision (b) has expired.

(d) Where there has been an overpayment of tax under section 221 or 237 any refund or credit made under the provisions of this section shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

(e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.

If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919.

(f) This section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

**Pertinent Part of Sections 308 and 310 of the Political Code
as Amended by Act of No. 75 of August 2, 1923.**

“Section 308.—For the purpose of revising the assessment and reassessment of real and personal property as provided by this Title, and for the purpose of passing on all claims made by taxpayers in respect to the assessment of their properties and the levying of property and income taxes, there shall be in the Department of Finance a permanent Board of Review and Equalization with an open office, to be composed of the Treasurer of Porto Rico and four persons versed in matters pertaining to the levying of taxes in Porto Rico, two of whom shall be agriculturists.....

“Section 310.—Said Board of Review and Equalization shall meet in regular session in the months of January, May and September of each year, and in special session at such other times as may be necessary in the opinion of the chairman. At said meetings the board shall hear appeals received and shall decide questions arising before the board relative to the greater or lesser amount at which property may be assessed for purposes of taxation, or to the amount of taxes, or to exemptions from taxation, or to fix the income tax of any taxpayer; and upon recording such determination, the board shall correct returns, and liquidate taxes to be levied on income returns filed, in accordance with its decision, and shall report the facts to the Department of Finance for such corrections, cancellations or issuance of receipts as may be proper. Said board shall have power to strike out, lessen or increase the valuations made in any schedule returned to it, whether or not complaint has been made in connection therewith, and to decide all other complaints in regard to the levying of property and income taxes, and to correct all errors as such errors are brought to its attention.....” (*Italics supplied.*)

APPENDIX B.

Opinions of the Supreme Court of Puerto Rico in the case of Porto Rico Fertilizer Company v. Domenech:

OPINION OF SUPREME COURT OF PUERTO RICO

Delivered by Associate Justice,

MR. ALDREY.

San Juan, Puerto Rico, November 13, 1935.

Porto Rico Fertilizer Company, a domestic corporation, paid without protest to the Treasurer of Puerto Rico, in the years 1926, 1927, 1928, 1929, 1930, 1931 and 1932, the taxes collected from it as withholding agent of the Virginia-Carolina Chemical Corporation, a corporation of the United States of America. The payment made in 1929 was so made on the 11th of June of said year. On the 4th of October 1933 Porto Rico Fertilizer Company petitioned the Treasurer of Puerto Rico for the refund of all said taxes because the same had been erroneously collected and paid, alleging that, while from 1924 to 1931 it borrowed money from the Virginia-Carolina Chemical Corporation, all said loans were made in Richmond, State of Virginia, where the money was spent and interest paid on the loans with money that the Porto Rico Fertilizer Company had on deposit with banks in New York, and that the Virginia-Carolina Chemical Corporation has not even had an agent in this island nor a representative or office therein. The Treasurer refused the refunds requested as regards the payments made up to the 11th of June 1929 for the reason that four years had elapsed since said payments were made. He also refused the refund of the taxes paid after said date. Against said decisions of the Treasurer of Porto Rico Fertilizer Company filed suit in the San Juan District Court praying that the Treasurer be ordered to return all the said taxes, alleging the facts hereinbefore set forth. Two payments were made in 1926 and in the complaint there are alleged eight causes of action.

one for each payment made. Said complaint was demurred to on the ground that it did not allege facts sufficient to constitute a cause of action, and the court sustained said demurrer of the defendant because the claim made for the payments to which the first five causes of action refer has been made after more than four years had elapsed. Regarding the payments made after the 11th of June, 1929, which are the payments to which the last three causes of action refer, the court held that it could not order the refund thereof because the payments were not made under protest and because Porto Rico Fertilizer Company should have appealed from the refusal of the Treasurer to return said taxes to the Board of Review and Equalization before it could resort to the courts of justice. Judgment was entered in conformity with said decision and plaintiff took this appeal.

In the brief filed in this court plaintiff acknowledges that the first five causes of action have prescribed, wherefore it limits its argument on appeal to the contention that the judgment is erroneous as to the last three causes of action, alleging that it does not have to make the payments under protest nor to appeal from the Treasurer's decision to the Board of Review and Equalization.

Law No. 74 of 1925, which is an income tax law, in force at the time the payments the subject of this appeal were made, in its Section 75 empowers the Treasurer to remit, reimburse and refund any taxes which appear to have been erroneously assessed or for an excessive amount or in any manner erroneously collected, charging him with the duty of reporting to the Legislature, at the inception of each ordinary session, all the transactions authorized in said section.

The said law, in its Section 76 and under the title "Limitations upon suits and Proceedings by the Taxpayer", provides in its subdivision (a) that the decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law, and that the taxpayer shall pay under protest such tax as

shall have been levied on him, within the time specified and within thirty days subsequent to such payment under protest may bring proper suit in a proper court, against the Treasurer of Puerto Rico. Said term of thirty days was extended to one year by law No. 8 of 1927. Subdivision (b) of said Section 76 provides that no suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof. The meaning of said subdivisions is that the income tax should be paid under protest before refund can be obtained, and that the suit against the Treasurer should be filed within a year, but that said proceeding shall not be maintained in any court unless, after payment under protest, a claim for refund shall have been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, before or after said period of one year. We have already stated that in the instant case the payment was not made under protest, as it should have been made.

On the other hand, it was necessary that appellant file an appeal with the Board of Review and Equalization from the decision of the Treasurer refusing the refund prayed for. The words of the law regarding appeal before the Board of Review and Equalization are sufficiently explicit to warrant the conclusion that they granted an appeal before the Board. Such an appeal was not taken.

For the reason that the payment was not made under protest and no appeal was taken to the Board of Review and Equalization, the judgment appealed from should be affirmed.

PEDRO DE ALDREY,
Associate Justice.

OPINION OF SUPREME COURT OF PUERTO RICO.

DELIVERED BY MR. CHIEF JUSTICE
DEL TORO.

San Juan, Puerto Rico, July 23, 1936.

This is a suit for the recovery of taxes. Plaintiff, a corporation organized in accordance with the laws of this island, alleges that during the years 1924 to 1931 it borrowed certain amounts of money from the Virginia-Carolina Chemical Corporation, a Virginia corporation having no agent in this island; that the loans were contracted for and the money paid in Richmond, Virginia, and used outside of Puerto Rico in the purchase of materials used by plaintiff in its business, and that the principal as well as interest on said loans were paid in Richmond by means of drafts against funds deposited in New York.

Plaintiff then sets forth eight separate causes of action. The first one, copied literally, reads:

"6. That on May 20, 1926 plaintiff was notified by the Treasurer of Puerto Rico that said official had assessed in the sum of \$786.29 the amount of income tax payable by the Virginia-Carolina Chemical Corporation for interest paid to said corporation by plaintiff during the period of time from July to December, 1924, by virtue of the loans described in paragraph second of this complaint, notifying this plaintiff at the same time that it should pay said amount as withholding agent of the said Virginia-Carolina Chemical Corporation, and plaintiff alleges that on the 19th of June, 1926 it paid said sum of \$786.29 to the Treasurer of Puerto Rico for the aforesaid taxes."

The remaining causes of action refer to the years 1925, 1926, 1927, 1928, 1929, 1930 and 1931, payments having been made respectively in 1926, 1927, 1928, 1929, 1930, 1931 and 1932.

Plaintiff further alleges that for the reason that neither the Virginia-Carolina Chemical Corporation nor the loans

in question ever had a situs in Puerto Rico, the collection of the tax on income earned and received outside of Puerto Rico was illegal; that in accordance with Section 75 of Law No. 74 of 1925 the Treasurer of Puerto Rico is authorized to return said taxes, and that on October 3, 1933, plaintiff asked the Treasurer for the return of said taxes and the Treasurer on the following day refused said petition as regards the payments referred to in the first, second, third, fourth and fifth causes of action, basing said refusal on subdivision (b) of Section 64 of said Law No. 74 of 1925, and on the 30th of the said month of October, 1933 he denied said petition also with regard to the payments referred to in the sixth, seventh and eighth causes of action.

Plaintiff prayed for judgment ordering the refund of the said taxes with interest from the date they were paid.

Defendant demurred to the complaint alleging lack of facts to constitute a cause of action, and the court sustained said demurrer granting plaintiff leave to amend its complaint.

Plaintiff petitioned for a reconsideration and judgment on the pleadings in case the reconsideration were denied. The District Court affirmed its original opinion and rendered judgment dismissing the complaint. And it is against this judgment that this appeal was taken. The assignment of errors, copied literally, reads as follows:

"1. That the District Court erred in deciding that the complaint does not state facts sufficient to constitute a cause of action.

"2. That the San Juan District Court erred in deciding that plaintiff should have appealed to the Board of Review and Equalization before making payment of the amounts claimed, and/or that said plaintiff should have paid said taxes under protest, and in deciding that because it did not do so said plaintiff has no cause of action.

"3. That the San Juan District Court erred in deciding that plaintiff should have appealed to the Board of Review and Equalization from the refusals of the Treasurer of October 4 and 30, 1933, with

regard to the claim for refund filed by plaintiff with said official, and in deciding that because said appeals were not instituted plaintiff has no cause of action."

In its brief plaintiff-appellant admits that its first five causes of action have prescribed and confines itself to arguing its case as to the sixth, seventh and eighth causes of action. The Treasurer filed his brief and after hearing the case the appeal was decided by this court on November 1935, affirming the judgment appealed from.

In the opinion on which the judgment is based the court decided in part as follows:

"Law No. 74 of 1925, which is an income tax law, in force at the time the payments the subject of this appeal were made, in its Section 75 empowers the Treasurer to remit, reimburse and refund any taxes which appear to have been erroneously assessed or for an excessive amount or in any manner erroneously collected, charging him with the duty of reporting to the Legislature, at the inception of each ordinary session, all the transactions authorized in said section. The said law, in its Section 76 and under the title 'Limitations upon suits and Proceedings by the Taxpayer', provides in its subdivision (a) that the decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law, and that the taxpayer shall pay under protest such tax as shall have been levied on him, within the time specified and within thirty days subsequent to such payment under protest may bring proper suit in a proper court, against the Treasurer of Puerto Rico. Said term of thirty days was extended to one year by Law No. 8 of 1927. Subdivision (b) of said Section 76 provides that no suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and

the regulations established in pursuance thereof. The meaning of said subdivisions is that the income tax should be paid under protest before refund can be obtained, and that the suit against the Treasurer should be filed within a year, but that said proceeding shall not be maintained in any court unless, after payment under protest, a claim for refund shall have been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, before or after said period of one year. We have already stated that in the instant case the payment was not made under protest, as it should have been made. On the other hand, it was necessary that appellant file an appeal with the Board of Review and Equalization from the decision of the Treasurer refusing the refund prayed for. The words of the law regarding appeal before the Board of Review and Equalization are sufficiently explicit to warrant the conclusion that they granted an appeal before the Board. Such an appeal was not taken.

For the reason that the payment was not made under protest and no appeal was taken to the Board of Review and Equalization, the judgment appealed from should be affirmed."

For the reasons set forth plaintiff requested this court to modify "the opinion rendered in this case sustaining that the doctrine established in the cases of *American Colonial Bank of Porto Rico v. Gallardo* and *Soto Gras v. Domenech* has not been modified in any manner; conforming the opinion and judgment in this case with the doctrine established in the aforesaid cases, or making the corresponding distinction, if possible, between the doctrine established in this case and the doctrine established in said other cases, for the purpose of avoiding serious confusion regarding the construction of the law and the authorities applicable and to prevent serious confusion regarding the construction of the law and the authorities applicable and to prevent serious injury to taxpayers who up to this date have acted and proceeded in good faith for the protection and defense of their rights in accordance with the decisions of this court in the aforementioned cases."

By order of January 14th last the court reconsidered judgment of November 13, 1935, and set a new hearing February 18, 1936. Both parties maintained their respective positions and Mariano Acoste Velarde, Esq., intervened in the case as *amicus curiae*, alleging, in fact, that Puerto Rico "the payer of income taxes has the right, acting under Law No. 74 of 1925 and its regulations, to obtain the refund of what is unduly paid, within four years after income taxes are erroneously paid, by means of a claim for refund and the proper judicial action, even if the payment was not made under protest."

The ultimate facts to be considered for the decision of this appeal are, therefore, that plaintiff, on October 3, 1933, filed with the defendant Treasurer three claims for refund of income taxes that it had paid without protest in 1930, 1931 and 1932; that the Treasurer denied said claims on October 30, 1933 and on November 3, 1933, plaintiff appealed from said denial to the District Court of San Juan. This being so, since the taxes paid correspond to and the payments thereof were made after the year 1925, the case is governed by Law No. 74 of 1925.

Section 75 of said law authorizes the Treasurer to remit, refund and return any taxes erroneously or illegally assessed or collected and penalties collected without authority, and any tax that appears to have been unjustly levied or for an excessive amount or for any reason erroneously collected.

The authorization cannot, in fact, be more ample. The Treasurer acts by himself. He is called upon to judge the merits of each claim. By said Section 75 he is only charged with the duty of rendering a report to the Legislature of Puerto Rico, at the inception of each regular session, of all the transactions carried to effect by him in the exercise of said authorization.

The taxpayer is called upon to render his income tax return and, as soon as practicable after the filing of said return, the Treasurer of Puerto Rico shall examine the same and determine the exact amount of the tax.

If the taxpayer declares no taxable amount, or if he does not file a return, the deficiency shall be the excess of the tax over the amounts previously assessed. When he so determines, the Treasurer shall notify the taxpayer and the latter, within thirty days from the date that the notice is deposited in the postoffice, may file an appeal with the Board of Review and Equalizaion stating the facts and grounds of his claim, in writing and under oath.

If the Board decides in favor of the taxpayer he shall not be liable for any part of the deficiency determined by the Treasurer and disallowed by the Board, and the Treasurer shall have the right, within the term of one year, to institute an action in a district court of competent jurisdiction, without assessment, for the collection of any part of the amount so disallowed. Of course, in such an action the taxpayer shall have the opportunity to defend himself, and judgment shall be rendered in accordance with the facts and the law.

The foregoing is more clearly provided by Sections 54, 56 and 57 of the law. See also Sections 62 and 64.

Section 76 (a) provides that the decisions of the Board shall be final and the taxpayer shall pay the tax under protest if he wishes to resort to the courts of justice.

Section 76 further provides that any actions so instituted by taxpayers shall have preference in the dockets of the courts, and the defendant shall set forth all his defenses at once and in one single writing and the case shall be promptly set and decided in one hearing.

Said section goes on to provide about the reconsideration by the said Board, and then commands that:

“(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treas-

urer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

Does this subdivision (b) mean that after the Treasurer denies the claim and said denial is affirmed by the Board, the claim for refund has to be filed, and if the Treasurer denies it appeal again to the Board in order to be able to resort to the courts of justice?

Such is the meaning, at first glance, of the terms of the law itself, and we so decided in the opinion rendered as grounds for the judgment which was made ineffective by the order of January 14th last.

Nevertheless, a careful consideration of the matter carries us to the conclusion that it is not possible that such was the intent of the legislator. Why such duplicity? If the Treasurer denies and the Board affirms his denial and the taxpayer pays under protest, why resort again to the Treasurer and why appeal again to the Board?

This court had already said in the case of *American National Bank of Porto Rico v. Domenech, Treasurer*, 43 P. R. 889, 891: "We also agree with appellant that, after appealing to the Board of Review and Equalization and the taxpayer pays under protest, it is not necessary, once a decision is made, to resort to said Board. The legislative intent was to grant a cause of action after payment under protest. Nevertheless, when drafting the said opinion in this case, our previous opinions were overlooked and when attention was called to that oversight a reconsideration was granted and the case was reopened for a new discussion and decision of the issues of the same."

It is therefore clear that when the taxpayer, feeling aggrieved by the income tax levied by the Treasurer, files his claim with said official and his claim is denied and he appeals to the Board, which also decides the case against him and he then pays under protest, he may, within the term of thirty days fixed by Law No. 74 of 1925, Section 76, first paragraph, resort to the courts of justice without any other

preliminary requisite, that is, without having to file a petition for refund with the Treasurer and without having to appeal again to the Board of Review and Equalization.

As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of justice without paying under protest. If said taxpayer feels aggrieved by the tax assessed, he may, within thirty days after being notified, appeal to the Board and obtain that said Board overrule the deficiency determined by the Treasurer, as provided in Section 57 of said law, and he may, if the decision of the Board is against him, pay under protest and, within thirty days after payment, resort to the courts of justice availing himself of the right granted by Section 76 of the said law of 1925. He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice.

The non-existence of the appeal to the courts when payment is not made under protest is a matter already decided by this court in the case of *Compañía Agrícola de Cayey v. Domench, Treas.*, 47 D. P. R. 535, 539, as follows:

“It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by means of law suit also disappeared. From 1921 on the payment under protest was an express condition preliminary to the initiation of a law suit. Though the law of 1921, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the refund of the taxes could be obtained. And such was the general understanding. We have before us an illustrative chart prepared by the Economic Commission of the Legislature containing the laws now in force, and the law of 1919 is

omitted therefrom. Generally, though the time elapsed is not so long, taking into consideration the contemporary construction, the law of 1919 is no longer in force. Therefore, though the law of 1925 granted the substantive right of filing appeal with the Treasurer even if the taxes were not paid under protest, said law did not keep in force or revive the remedy granted by the law of 1919."

The decisions in *Serrallés v. Treasurer*, 30 P. R. R. 220, *McCormick v. Bonner*, 44 D. P. R. 432, cited by the *curia*, are not applicable because they are based on the repealed law of 1919.

Therefore, under any phase that the case is considered, judgment appealed from should be affirmed.

We would consider this opinion terminated if the question had not been brought up and discussed amply as to the evidence that the decisions of this court in the cases of *American Colonial Bank v. Domenech, Treas.*, 43 D. P. R. and *Soto Gras v. Domenech, Treasurer*, 45 D. P. R. 940, and should have in the decision of this case.

The first of said cases has been cited and relied upon on the same question that the taxpayer who has filed a petition with the Treasurer, has appealed to the Board and has paid under protest, is not required to file a petition for refund with the Treasurer and appeal to the Board again before he may resort to the courts of justice. But that is not the question that we should now decide, but the following:

Notwithstanding the fact that this is a case of income taxes, this court decided that, in accordance with Law No. 8 of 1927 providing for payment of taxes under protest, the term within which the taxpayer could file suit was one year, and further said:

"Section 3 of Law No. 8 provided a manner of payment and a right of action which were prospective and excluded previous methods. So that, a previous law providing for the filing of suit within thirty days after the decision of the Board of Review and Equalization was necessarily repealed." *American Colonial Bank v. Domenech*, 43 D. P. R. 890, 891.

Undoubtedly the court referred to subdivision (a) of Section 76 of the Law No. 74 of 1925.

In the second case, that is, the case of *Soto Gras, supra*, this court stated in part as follows:

"After rendering our opinion in the above-entitled case, appellant The People of Puerto Rico filed a motion for reconsideration. Said motion was duly heard and is now before us. Inasmuch as other questions have been sufficiently discussed or decided in our original opinion or in other decisions of this Court, the only question that should be considered is whether the San Juan District Court lacked jurisdiction because the amount claimed by plaintiff was less than \$500 and because the suit should have been filed in a municipal court. The Government bases his contention on the fact that Section 76 of Law No. 74 of 1925 (page 401), in accordance with our opinion in the case of *American Colonial Bank v. Treasurer*, 43 D. P. R. 889, has been repealed by Law No. 8 of 1927 (Page 123) as regards payment under protest. In accordance with the law of 1925 it was clear that the taxpayer had to file his complaint in a district court. Nevertheless, if that law was repealed, the general provisions of law were applicable. We will assume for the time being, that up to 1925 a taxpayer had to file his claim for refund of taxes amounting to less than \$500 in a municipal court. Our decision in the case of *American Colonial Bank v. Treasurer, supra*, was that the questions of procedure provided for in the law of 1925 had been abrogated by the law of 1927. We were not dealing with the question of jurisdiction. Therefore, we are inclined to agree with appellee's contention and with appellant's suggestion that both laws could co-exist regarding the question of jurisdiction if the later law did not show the intention to grant jurisdiction to a municipal court. If both laws may subsist, then the intention of the legislature of requiring that a taxpayer resort to a district court was perfectly clear in the law of 1926."

It was insisted that the District Court had jurisdiction. Both decisions were accepted and applied by the Circuit

Court of Appeals for the First Circuit as holding that Section 76 of Law No. 74 of 1925 has been repealed by Law No. 8 of 1927, and in the case of *Domenech v. Verges*, 69 F. (2d) 714, 716, said court stated as follows:

"It is contended by counsel for the appellant that Act No. 8 of the Laws of 1927, providing for the recovery of taxes paid under protest, does not apply to the recovery of income taxes paid under protest; that it was a substitution for a general law enacted prior to the imposition of income taxes; and that, while it expressly repealed Act No. 9, approved June 23, 1924, and also Act No. 84, approved August 20, 1925, which acts provided generally for the recovery of taxes paid under protest, since it did not expressly refer to the Income Tax Act of 1924 approved August 6, 1925, in its repealing section, it should not be construed as repealing or modifying section 76(a) or (b) of that act relating to the recovery of income taxes paid under protest, though it repealed all conflicting laws or parts of laws.

The Supreme Court of Puerto Rico (however, in the case of *American Colonial Bank of Porto Rico v. Juan G. Gallardo*, 43 D. P. R. 889 (Spanish Edition) decided July 26, 1932, and in the case of *F. Soto Gras v. Domenech, Treasurer*, in an opinion handed down December 20, 1933, on a motion for reconsideration), has held that the method of procedure provided for the recovery in section 76 of the Income Tax Act of 1924 of income taxes paid under protest, was repealed by Act No. 8 of the Laws of 1927.

The interpretations of local law by the Supreme Court of Puerto Rico, unless clearly wrong, are followed by this court. The insular court is in a better position to interpret the intent of the local legislature than this court, and we are inclined to follow its construction in this instance, *De Villanueva v. Villanueva*, 239 U. S. 293, 299, 36 S. Ct. 109, 60 L. Ed. 293; *Cardona v. Quiñones*, 240 U. S. 83, 88, 36 S. Ct. 346, 60 L. Ed. 538; though we think Act No. 8 of the Laws of 1927 may be susceptible of another reasonable interpretation."

If such a construction subsists, everything we have herein stated and decided in this opinion by application of Section 76 of Law No. 74 of 1925 would fall by its own weight.

We realize the difficult situation, but a careful and thorough study of the question compels us to decide it differently from our decision in the said case of *American Colonial Bank, supra*, affirmed, but which was not really relied on with all its consequences in the other case of *Soto Gras, supra*, since the jurisdictional ruling established in the special law and not that of the general law was finally applied.

Our grounds for reaching the aforesaid conclusion are that Law No. 74 of 1925 is a special law, complete, referring to a certain tax—income tax—clearly worded, which should prevail over the general law referring to suits in cases of taxes paid under protest, especially when said general law contains a repealing clause which reads:

“Section 6. Act No. 9 of June 23, 1924, and Act No. 84 of August 20, 1925, are hereby repealed, as well as all laws or parts of laws in conflict herewith: Provided, That any act, proceeding or right born under the protection of the laws hereby repealed, shall continue so protected by the provisions thereof, until its termination.” (Laws of 1927, p. 124.)

The laws expressly repealed, i. e., No. 9 of 1924 and No. 84 of 1925, were also laws of a general character, as were Law No. 17 of 1920, repealed by Law No. 9 of 1924, and Law No. 35 of 1911—the first law on the matter—which was repealed by Law No. 17 of 1920.

The general system relative to suits in cases of taxes paid under protest being in force, and laws complete in themselves having been approved, the clear purpose of the legislator was that both laws should subsist within their own scope of action. If any doubt should subsist it would be dispelled by the action of the legislature itself in this year 1936 amending said section 76 of Law No. 74 of 1925 by adding thereto the following proviso: “Provided, that once the case is decided

upon a first reconsideration, no other proceeding shall be entertained by the Board, with the exception of what is provided in subdivision (b) of this section", which implies that it considered said section to be in force, notwithstanding the general law that it enacted in 1927 regarding payment of taxes under protest. See the cases of *Kessler v. Domenech, Treasurer*, 49 D. P. R. 196, and *Sucesión Puente v. El Pueblo*, 19 P. R. R. 560.

Wherefore, the motion for reconsideration is hereby dismissed and the judgment appealed from should be affirmed.

EMILIO DEL TORO,
Chief Justice.

OPINION OF SUPREME COURT OF PUERTO RICO

Delivered by Chief Justice Mr. DEL TORO.

San Juan, Puerto Rico, February 26, 1937.

The reconsideration of the judgment rendered in this case on the 23d of July, 1936, has been prayed for.

It seems advisable to remember that this appeal was originally decided by judgment of November 13, 1935, affirming the judgment appealed from, and that it was appellant itself who petitioned this court to modify "the opinion handed down in this case holding that the doctrine established in the cases of *American Colonial Bank of Puerto Rico v. Gallardo*, and *Soto Gras v. Domenech*, has not been modified in any manner; conforming the opinion and judgment in this case with the doctrine established in the aforementioned cases, or making the corresponding distinction, if possible, between the doctrine established in this case and the doctrine established in said other cases, for the purpose of preventing serious confusion as to the construction of the law and the authorities applicable and to prevent serious injury to taxpayers who up to this date have acted and proceeded for the protection and defense of their rights in

accordance with the decision of this court in the aforementioned cases.”

Realizing the necessity of establishing a clear final on the matter, this court decided to reconsider and reconsider its said judgment of November 13, 1935, and decided to hear the parties again, as it did hear them amply, in writing and orally, and also heard the amicus curiae Mr. Acosta Velarde.

And it was by virtue of said careful study by the attorneys and by the court that the latter finally came to face the unavoidable question of a written provision of law which had to be made effective. Such is the gist, on a final analysis of the lengthy opinion of which appellant now complains. It was on appellant's own request that the question was finally cleared, so that the injuries to which said appellant refers in its motion for reconsideration may not continue to be occasioned.

We realized the difficulty of the question when we found that it had been decided to the contrary by the Circuit Court of Appeals for the First Circuit, and we so stated in our said opinion. 50 D. P. R. 405, 417.

Appellant now contends that the decision of the Circuit Court constitutes a rule of *stare decisis* which should be accepted and followed. It might be so but is not, in our judgment, under the concurring circumstances.

In the first place, the time elapsed is too short for an unassailable rule of *stare decisis* to have arisen; in the second place, in following the decisions of this Supreme Court the District Court acted in a manner that does not reveal its own conviction but deference to the local tribunal, and in the third place, the question is one of written law and one of equity. If the law has been purified it is not susceptible of construction. Courts have no legislative powers.

The reconsideration prayed for should be denied.

EMILIO DEL TORO
Chief Justice

en-
me
re-
led
rit-
ano
or-
ith
ieh
sis,
ns.
was
ant
on-
and
urt
the
mit
ac-
dg-
an
sec-
urt
its
the
the
on.
ice.



FILE COPY

Office - Supreme Court U. S.

MAR 10 1939

CHARLES EDWIN CROPLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,
against

YABUCOA SUGAR COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR RESPONDENT.

✓ EARLE T. FIDDLER,
Attorney for Respondent.

ANDREW KIRKPATRICK,
HERBERT S. McCONNELL,
of Counsel.

MICROCARD

TRADE MARK 

22



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

379

38-69





INDEX.

	PAGE
POINTS I AND II	1
POINT III	2
POINT IV	6
CONCLUSION	6

TABLE OF CASES.

<i>United States v. Babcock</i> , 250 U. S. 328	2, 3, 4
<i>United States v. Dismuke</i> , 297 U. S. 167, 172	2, 3, 4, 5
<i>United States v. Hvoslef</i> , 237 U. S. 1	4
<i>United States v. Laughlin</i> , 249 U. S. 440	4, 5

STATUTES CITED.

Puerto Rican Income Tax Act of 1919:

Section 66	6
------------------	---

Puerto Rican Income Tax Act of 1924:

Sections 54, 55, 64 and 75	3, 4
Section 76	4
Section 76a	6
Section 76b	5, 6



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 498

RAFAEL SANCHO BONET, *Treasurer of Puerto Rico,*
Petitioner,

against

YABUCOA SUGAR COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR RESPONDENT.

Pursuant to leave granted on the hearing of this case Respondent respectfully submits the following observations on the points covered by Petitioner's Reply Brief:

Points I and II.

The contention of Respondent which is criticised (Petitioner's Reply Brief 1-3) is directed solely to the question raised by Petitioner himself:—that complaint does not state facts sufficient to constitute a cause of action. Respondent's position is that since the demurrer was sustained in the District Court and affirmed by the Supreme Court solely

on jurisdictional grounds and without consideration of the sufficiency of the facts, the question should not be passed upon by this court for the first time. Certainly if the case had rested on this ground in the court below Respondent would have been given the opportunity to amend. Nevertheless, in order squarely to meet Petitioner in this contention, we answered the point raised, in order to show that demurrer should not be sustained on this ground since the Board of Review and Equalization had ample power to make a complete reexamination of the return, and its decision in favor of the taxpayer is at least tantamount to a *prima facie* case which the Treasurer can only meet by affirmative allegations in an answer and not by demurrer.

POINT III.

Respondent does not contend, as might be inferred from the observations made on page 3 of the Reply Brief, that the authority delegated to Treasurer is discretionary and therefore unconstitutional. Respondent's position is that the Treasurer is under a *mandatory* obligation to determine the correct amount of the tax and to credit or return to the taxpayer any overpayment as commanded by Sections 54, 55, 64 and 75 of the law, and that therefore the Legislature, in the absence of a positive prohibition, did not intend that access to the Courts should be denied.

United States v. Babcock, 250 U. S. 328, which Petitioner discusses at length (pp. 5 and 6) not only is distinguished by its own language but the distinction is emphasized in the sentence from the opinion of Mr. Justice Stone, in *United States v. Dismuke*, 297 U. S. 167, 172, omitted by asterisks in the quotation on page 22 of Petitioner's main brief.

What Petitioner does not point out in quoting from *United States v. Babcock* is that the decision there is rested

solely on the positive language of the statute expressly denying access to the courts:

"That any claim which shall be presented and acted on under authority of this act shall be held as finally determined and shall never thereafter be reopened or considered." (p. 331.)

What the court held in the *Babcock* case was that Congress could, and in effect did by that provision, limit and expressly exclude the right of recourse to the courts. There is no provision whatever in the Puerto Rican Income Tax Act of 1924 which makes the Treasurer's decision on a claim for credit or refund final, or from which such finality can be inferred.

The *Dismuke* case, in which the *Babcock* case is expressly distinguished, was brought under the Tucker Act permitting suits against the United States and which confers jurisdiction on the Courts to try claims "*founded upon any law of Congress, or upon any regulations, etc.*" The Court said (p. 169):

"Section 8 (a) of the Retirement Act declares that, under certain conditions specified the employee 'shall be entitled to an annuity payable from the Civil Service retirement and disability fund'. The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States. The present suit to recover the annuity is thus upon a claim 'founded upon a law of Congress' and is within the jurisdiction conferred upon district courts, as are suits to recover sums of money which administrative officers are directed by Act of Congress to 'pay' or 'repay'."

The contention had been made in that case and had prevailed in the District Court, just as it has been made here, and as Judge Morton maintained in his dissenting opinion in the Circuit Court, that the District Court was without jurisdiction because the Retirement Act must be

construed as committing the adjudication of claims under it solely to administrative officers to the exclusion of the Courts. It was argued that prohibition to bring suit was implied under the administrative provisions of the Act in question just as it is here urged. Yet this Court, after distinguishing the *Babcock* case as one where review by the Courts was *expressly* prohibited, proceeded to hold that "in the absence of *compelling* language, resort to the Courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer" (p. 172). This Court then proceeded at length to define the limitation of such authority.

Sections 54, 55 and 64 of the Income Tax Law are as imperative as the Section of the Retirement Act which this Court held in the *Dismuke* case to be a "law of Congress" under which suit might be brought.

The same contention which was made in the *Dismuke* case was made and rejected by this Court in *United States v. Hvostef*, 237 U. S. 1, and in *United States v. Laughlin*, 249 U. S. 440, both of which cases are cited in our main brief. In all of these cases this Court held that the section of the law commanding the public officer to take the action under discussion was the "law of Congress" upon which the claim was founded under the Tucker Act.

Judge Morton in his dissenting opinion in this case thought that the words "according to the provisions of law in that regard" in Section 76 (b) referred to "no suits or proceedings" and concluded that there was no such law apart from that section (R. 35). While we think it is clear that the words "according to the provisions of law in that regard" refer to the filing of the claim for credit or refund (Brief 18), even if Judge Morton had been correct in his grammatical construction, the "law in that regard" in this case is just as completely established by Sections 54, 55, 64 and 76 of this Act as the "law of Congress" which brings the cases above referred to, under the Tucker Act.

Certainly it cannot be said in view of these cases that there is no law in this case upon which the suit provided for in Section 76 (b) is founded.

We fully agree with the principles laid down in the *Dismuke* case as quoted on p. 6 of the Reply Brief, with respect to the extent to which the Court may review the action of the public officer *once jurisdiction is taken by the Court*. The important thing is that the Court *did take jurisdiction*.

The *Laughlin* case cannot be distinguished, as Petitioner attempts to do on page 4, on the ground that only questions of law were involved. Once jurisdiction of the Court is conceded, the only questions normally involved in any case are whether or not the public officer applied the proper principles of law to a particular state of facts, and whether or not the official in question has exceeded "his authority by making a determination which is arbitrary or capricious or unsupported by evidence" as stated in the *Dismuke* case.

The *extent of the review* is an entirely subsidiary matter and may vary under different circumstances. For example in this case the Treasurer has been reversed by the Board of Review but it is the *Treasurer* who is being sued. That might alter the extent to which the Trial Court would be compelled to accept his findings of fact. We submit, however, that this is a point which might well be left to the Puerto Rican Courts to decide in case they are directed by this Court to take jurisdiction.

We certainly cannot agree, as Petitioner urges on page 5 that only questions of fact are involved in this case. We do not know what legal principles may arise. In fact it is not at all unlikely, if the case is sent back, that a question of law will immediately arise, namely the presumption to be derived from a decision by the Board adverse to the Treasurer.

POINT IV.

In his main brief Petitioner contends that Section 76 (b) is a "negative pregnant" and not an affirmative grant of power (p. 23). He now maintains (Reply Brief, p. 7) that it "~~was~~ enacted by the Legislature for a very important purpose, viz., that of emphasizing and driving home the legislative intent that there should be no recourse to the courts from decisions of the Treasurer under Section 75⁽¹⁾ on petitions for refund of supposed overpayments of taxes made voluntarily and without protest or objection of any kind".

The argument now made is not consistent with the previous argument and the suggested intention is not supported by the context.

If the Legislature had desired to drive home the suggested intent it is more probable that Section 76 (b) would have read simply and straightforwardly:

"(b) No suit or proceeding shall be brought to recover an overpayment."

Conclusion.

The only reasonable interpretation of Section 76 (b), if it is to be given any meaning at all, is that it was inserted as an independent part of Section 76 following Section 76 (a),—in what is now made a separate title of the Act (and it is by no means a *sub-section* of 76 (a), either by virtue of its position in the statute or by its subject matter) with the intention that it should perform the same function as was performed in the 1919 Act by the second paragraph of Section 66, which, for this reason, is omitted in the 1924 Act.

⁽¹⁾ Claims for refund or credit referred to in Section 76(b) are provided for by Section 64 (b) and not by Section 75.

Any other construction places the administrative officer in the performance of the task which he is ordered in no uncertain terms to perform, beyond the control of the Courts. In the absence of any provision in the statute, to that effect, it is difficult to believe that the Legislature intended to have given the Treasurer such uncontrolled power.

Respectfully submitted,

EARLE T. FIDDLER,
Attorney for Respondent.

Washington,
March 8, 1939.



MAY 19 1939

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1938.

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,
against

YABUCOA SUGAR COMPANY,
Respondent.

PETITION FOR REHEARING.

EARLE T. FIDDLER,
Attorney for Respondent.

MITCHELL B. CARROLL,
ANDREW KIRKPATRICK,
HERBERT S. McCONNELL,
Of Counsel.



TABLE OF CONTENTS.

	PAGE
FIRST GROUND	1
SECOND GROUND	4
THIRD GROUND	5
APPENDIX	7

TABLE OF CASES CITED.

<i>American Colonial Bank of Porto Rico v. Domenech</i> , 43 P. R. R. 853 (decided July 26, 1932)	2
<i>Puerto Rico Fertilizer Company v. Domenech</i> , 50 De- cisiones de Puerto Rico, 405 (first decided Novem- ber 13, 1935 and on July 26, 1936 on reconsidera- tion)	3
<i>People of Puerto Rico v. Shell Co. (P. R.) Ltd. et al.</i> , 49 D. P. R. 226, 234 (reversed by this Court, 302 U. S. 253, 82 L. ed. 235)	5
<i>Rafael Sancho Bonet, Treasurer of Puerto Rico, v.</i> <i>Yabucoa Sugar Company</i> , No. 498, decided March 27, 1939	1

TABLE OF STATUTES.

INCOME TAX ACT OF PUERTO RICO (1925):	
Section 57	2
Section 57a	2
Section 76a	2
Section 76b	2, 4
POLITICAL CODE OF PUERTO RICO:	
Section 308	5
Section 310	5



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,
against

YABUCOA SUGAR COMPANY,
Respondent.

PETITION FOR REHEARING.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, represented by the undersigned attorney, respectfully applies for a rehearing and modification of the opinion in the case entitled *Rafael Sancho Bonet, Treasurer of Puerto Rico, Petitioner, v. Yabucoa Sugar Company*, No. 498, decided by this Court on March 27, 1939, on the following grounds:

FIRST.

The opinion of the Supreme Court of the United States in this case appears to rest squarely upon the doctrine that decisions of the Courts of Puerto Rico should not be reversed in purely local matters unless clearly wrong.

The Supreme Court of the United States, however, in the last paragraph on page 2 of its opinion in this case, makes the following statement:

“Furthermore four different sections of the 1925 Act (57, 60, 62 and 76 (a)) constitute a statutory plan under which a taxpayer who pays under protest is granted the right to sue in the courts for refund. *Such a taxpayer can sue at law under these sections only if he has been denied refund by both the Treasurer and Board of Review and Equalization of the Island.*” (Italics supplied.)²

Your petitioner respectfully calls the attention of the Court to the fact that the last sentence of the above quotation is contrary to the established practice in Puerto Rico and to the express decision of the Supreme Court of Puerto Rico in the *American Colonial Bank of Porto Rico v. Domenech*, 43 P. R. R. 853 (decided July 26, 1932).

The *American Colonial Bank* case, *supra*, involved a suit to recover a deficiency tax assessed by the Treasurer of Puerto Rico pursuant to section 57 of the 1925 Income Tax Act of Puerto Rico. The taxpayer had been notified by the Treasurer of a deficiency, had appealed from such notice to the Board of Review and Equalization under section 57 (a) of the statute and had, after decision by the Board, paid the amount of the deficiency or additional tax under protest. It was argued on behalf of the Treasurer that the taxpayer was required under sections 76 (a) and 76 (b) of the statute, to file a claim for credit or refund with the Treasurer and with the Board on appeal before bringing suit at law to recover the payment. (Sections 57 (a) (b) and (c) and 76 (a) and (b) of the statute are set forth in the Appendix hereto.) The Puerto Rican Supreme Court, however, held:

“We also agree with appellant that if after recourse to the Board of Review and Equalization a taxpayer pays under protest no necessity arises after such payment to recur to said Board. *The intention of the Legislature was to give a right of action after payment under protest.*” (Italics supplied.)

This holding was affirmed by the Supreme Court of Puerto Rico in *Puerto Rico Fertilizer Company v. Domenech*, 50 Decisiones de Puerto Rico, 405 (first decided November 13, 1935 and on July 26, 1936 on reconsideration). The opinions of the Court in the last cited case are set forth in full in Appendix B of respondent's brief already filed with this Court.

In other words, the Supreme Court of Puerto Rico has consistently held that the only steps necessary to the recovery by suit at law of *deficiency taxes* are (a) appeal from the notice of deficiency to the Board of Review and Equalization *before payment*, (b) payment under protest after decision by the Board of Review and Equalization, and (c) filing a suit to recover the amount so paid against the Treasurer within the statutory period after payment. There is not, and never has been, since the decision in the *American Colonial Bank* case, *supra*, a requirement that a claim for credit or refund of deficiency taxes be filed with the Treasurer and on appeal with the Board *after payment* under protest.

In so far as the underlined portion of the opinion of this Court quoted above applies to deficiency taxes, it is not only contrary to the existing decisions of the Supreme Court of Puerto Rico but is immaterial to the decision in the instant case because the recovery of a deficiency tax is not herein involved but rather the recovery of a tax voluntarily paid by the taxpayer. Furthermore, in so far as it applies to such a voluntary overpayment this Court has decided in the instant case that protest is a necessary condition precedent to suit at law and therefore the question of whether or not the filing of a claim for credit and refund with the Treasurer and with the Board on appeal are also necessary conditions precedent to such a suit is immaterial to the decision of this court. If this Court passes on said question its decision would to that extent go beyond the decision of the Supreme Court of Puerto Rico which decided simply that suit at law does not lie to recover any tax unless paid under protest.

Accordingly this Court is hereby respectfully requested to modify its opinion by striking therefrom the sentence appearing on page 3 thereof, as follows:

“Such a taxpayer can sue at law under these sections only if he has been denied refund by both the Treasurer and Board of Review and Equalization of the Island.”

SECOND.

The Supreme Court of Puerto Rico in the instant case held merely that payment under protest is a necessary condition precedent to the recovery of any tax in Puerto Rico. Since the opinion of the Supreme Court of the United States is based on the doctrine that the local courts of Puerto Rico will not be reversed in local matters unless clearly wrong, it is assumed that this Court intended to follow the opinion of the Supreme Court of Puerto Rico in the instant case and to hold merely that payment under protest is a necessary condition precedent to suit to recover any tax, leaving the Supreme Court of Puerto Rico free to deal with other points in subsequent cases as they may arise.

However, the portion of the opinion beginning with the fifth line on page 3 goes beyond the existing decisions of the Supreme Court of Puerto Rico in that it implies (last sentence) that no authority, express or implied, is granted by the statute in question to comply with the required condition precedent to the right of suit under section 76 (b). The language in question is as follows:

“And Section 76 (b) which the Circuit Court of Appeals interpreted as authorizing suit by a taxpayer who paid without protest expressly prohibits suit in Court ‘until a claim for refund or credit has been duly filed with (*the Treasurer and with) the Board of Review and Equalization on *appeal* according to the provisions of law in that regard and the regulations established in pursuance thereof.’ (Italics

* NOTE: Inserted by Petitioner to complete the quotation of the statute.

supplied.) *Since a voluntary taxpayer is given no express right of appeal from the Treasurer to the Board by the 'provisions of law in . . . regard' to such appeals, he is not expressly authorized to comply with the condition precedent to right of suit under Section 76 (b).'*" (Italics supplied.)

Neither in this nor any other case has the Supreme Court of Puerto Rico passed directly or indirectly upon the question of whether the taxpayer has a right of appeal to the Board from the Treasurer's decision. The ground for the decision of the Supreme Court of Puerto Rico in the instant case was simply that payment had not been made under protest and that therefore no action could be maintained at law to recover the overpayment (R., 20, 21).

Since the Supreme Court of Puerto Rico has not passed upon the right of the taxpayer to appeal to the Board of Review and Equalization, and since it is believed that the question is not involved in, or necessary to the decision of, the instant case, your Petitioner respectfully requests this Court to modify its opinion so as to remove the inference that the insular Income Tax Act approved in 1925 and the provisions of sections 308 and 310 of the Political Code of Puerto Rico do not authorize an appeal to the Board of Review and Equalization from a denial of a claim for credit or refund by the Treasurer.

THIRD.

The reason for the rule of this Court to the effect that the decisions of the Supreme Court of Puerto Rico on matters of local law will be affirmed unless clearly wrong, requires, Petitioner believes, a corollary rule to the effect that this Court will not pass upon matters of local law not theretofore passed upon by the Supreme Court of Puerto Rico, unless essential to the decision of the case presented to this Court. The Supreme Court of Puerto Rico believes itself bound by the decisions of this Court. This belief found direct expression in *People of Puerto Rico v. Shell*

Co. (P. R.) Ltd. et al., 49 D. P. R. 226, 234 (reversed by this Court, 302 U. S. 253, 82 L. ed. 235), where the insular Court, in commenting upon a contrary decision by the Supreme Court of Oklahoma, said:

"... This would also be our opinion if we did not feel ourselves bound by the decisions of the Supreme Court of the United States. It may be that we are interpreting erroneously the doctrine laid down by the high court, and if so, we would be happy to have been mistaken and to have our error corrected, but so far we have not been convinced that we have erred in such interpretation." (Our translation.)

As we have pointed out, the opinion of this Court in the instant case appears to have reversed settled decisions of the Supreme Court of Puerto Rico on matters of income tax procedure (see point first), and to have passed upon the jurisdiction of the Board of Review and Equalization in matters not heretofore considered by the Supreme Court of Puerto Rico (see point second). We submit that this is contrary to the purpose and intent of the rule that decisions of the Supreme Court of Puerto Rico on matters of local law will be affirmed unless clearly wrong, and to what we believe should be the corollary rule that the Supreme Court of the United States should not pass upon matters of local law not theretofore passed upon by the local courts unless essential to the decision of the Supreme Court of the United States in the case before it.

Petitioner therefore requests this Court to limit its decision to a holding that payment under protest is a necessary condition precedent to suit at law to recover voluntary overpayments of income tax, which was the sole question decided by the Supreme Court of Puerto Rico in the instant case.

Respectfully submitted,

EARLE T. FIDDLER.
Attorney for Petitioner.

San Juan, Puerto Rico,
May 10, 1939.

APPENDIX.

PERTINENT PROVISIONS OF THE PUERTO RICAN INCOME TAX ACT OF 1925.

Section 57—(a) If, in the case of any taxpayer, the Treasurer determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 30 days after such notice is mailed the taxpayer may file an appeal with the Board of Review and Equalization, alleging in writing and under oath the legal facts and grounds on which such appeal is based.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the Treasurer. No part of the amount determined as a deficiency by the Treasurer but disallowed as such by the Board shall be assessed, but a proceeding in a district court of competent jurisdiction may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 60 has expired.

(c) If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the Treasurer.

Section 76—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a recon-

sideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Puerto Rico.

Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence and the hearing shall be set promptly for final decision.

If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case sufficient legal grounds and facts for applying again to the Board for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of Puerto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.

(8913-D)

SUPREME COURT OF THE UNITED STATES.

No. 498.—OCTOBER TERM, 1938.

<p>Rafael Sancho Bonet, Treasurer of Puerto Rico, Petitioner, <i>vs.</i> Yabucoa Sugar Company.</p>	}	<p>On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.</p>
---	---	---

[March 27, 1939.]

Mr. Justice BLACK delivered the opinion of the Court.

Respondent sued the Treasurer of Porto Rico in a local district court for recovery of 1927 income taxes paid under the laws of the Island. By construction of the local Porto Rican statutes permitting suits for refunds, the local district court found that no right had been granted to sue at law for taxes voluntarily paid. The bill of complaint was then dismissed for lack of jurisdiction, because it disclosed that the tax in question had been paid voluntarily and without protest. The Supreme Court of Porto Rico affirmed, but was reversed by the United States Circuit Court of Appeals.¹

As conceded by respondent, this suit cannot be maintained unless authorized by a Porto Rican law, because Porto Rico cannot be sued without its consent.² It is also conceded that the Porto Rican legislature is not obligated to provide a judicial remedy for tax refunds.³ Respondent's contentions here are that the governing statutes of the Island do authorize the present suit "either by express language or by necessary implication," and that the Porto Rican courts erroneously construed the local statutes.

Section 75 of the controlling Income Tax Act of Porto Rico, approved August 6, 1925,⁴ authorizes the Treasurer "to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, . . . and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected," and requires him to "report to The Legislature of Porto Rico at the

¹ 98 Fed. (2d) 398. The opinion of the Supreme Court of Porto Rico, and its opinion on rehearing, have as yet been reported only in Spanish. 50 D. P. R. 962, 51 D. P. R. 135.

² See *Porto Rico v. Rosaly*, 227 U. S. 270, 274; *Puerto Rico v. Shell Co.*, 302 U. S. 253, 262.

³ *Cf.*, *Dismuke v. United States*, 297 U. S. 167, 171, 172.

⁴ *Laws of Porto Rico 1925*, p. 400, 536.

beginning of each regular session . . . all transactions under this section."

The courts of Porto Rico construed Section 75 to mean that the Treasurer's refusal to refund taxes not paid under protest is final that the local statutes grant the courts no jurisdiction to review this refusal; and that after the Treasurer's report to the legislature a voluntary taxpayer's complaint must be addressed to the legislature. Disagreeing with this construction given the statute by the courts of Porto Rico, the Circuit Court of Appeals (one Judge dissenting) found that the 1925 Act plainly provided a resort to the courts, even in suits to recover taxes voluntarily paid without protest.

It is necessary that we examine some of the considerations which led to the Porto Rican courts' construction of Section 75 of the 1925 Act. For illustration, Section 66 of the Porto Rican Income Tax Law of 1919⁵ imposed upon the Treasurer the duty of making tax refunds (as in Section 75 of the 1925 Act), but Section 66 contained an express provision for "appeal to the courts" if a taxpayer's claim were denied by the Treasurer.⁶ The omission of this express provision from Section 75 and all other Sections of the 1925 Act was logically considered by the Porto Rican courts to be of significance in the construction of that Act. The right of appeal to the courts contained in Section 66 of the 1919 Law was first omitted from the 1921 Porto Rican Law,⁷ and this led the Supreme Court of Porto Rico to declare in the present case that "since 1921, . . . the right to bring suits for the recovery of taxes other than those paid under protest has been abrogated."⁸

Furthermore, four different sections of the 1925 Act (57, 60, 62 and 76(a)) constitute a statutory plan under which a taxpayer who pays under protest is granted the right to sue in the courts for

⁵ Laws, 1919, p. 612, 666.

⁶ Section 66: "That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.

"That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act."

⁷ Laws, 1921, p. 312.

⁸ *Compania Agricola de Cayey, Ltd. v. Domenech, Treasurer*, 47 D. P. R. 535 (Spanish ed.), decided prior to the present case, is to the same effect.

refund. Such a taxpayer can sue at law under these sections only if he has been denied ~~refund~~ *refused* by both the Treasurer and the Board of Review and Equalization of the Island. But these sections nowhere expressly authorize appeal from the Treasurer to the Board by one who paid taxes without protest. And Section 76(b), which the Circuit Court of Appeals interpreted as authorizing suit by a taxpayer who paid without protest, expressly prohibits suit in court "until a claim for refund or credit has been duly filed with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof." (Italics supp.) Since a voluntary taxpayer is given no express right of appeal from the Treasurer to the Board by the "provisions of law in . . . regard" to such appeals, he is not expressly authorized to comply with the condition precedent to right of suit under Section 76(b). Rights denied by the statutes could not be granted by regulations.

In addition, Section 76(b) of the 1925 Act is practically identical in language with Section 3226 of United States Revised Statutes governing suits for refunds of United States taxes.⁹ But the legislature of Porto Rico—while apparently using Section 3226 as a model—omitted from 76(b) the clause of Section 3226 reading "suit or proceeding [for tax refund] may be maintained, whether or not such tax . . . has been paid under protest or duress." This substantial adoption of Section 3226, omitting the clause authorizing suit without protest, (as well as the similar omission from the 1921 Act), could hardly represent accidental oversight, but instead indicate a deliberate legislative purpose.¹⁰

Congress first granted local authority to the government of Porto Rico in 1900¹¹ and comprehensively revised the original plan in 1917.¹² Both enactments manifest a congressional purpose to preserve—consistently with our system of government—the then existing governmental practices. Laws and ordinances then in effect and not contrary to our laws or Constitution were continued in full force, subject to alteration by the Porto Rican legislature or Congress. Original and appellate local courts, their jurisdiction and procedure, were preserved by Congress, and local officials were left in office.¹³ And this Court has declared its unwillingness to over-

⁹ 43 Stat. 253, 343.

¹⁰ Cf., *United States v. McClure*, 305 U. S. —, p. —.

¹¹ Act of April 12, 1900, c. 191, 31 Stat. 77.

¹² Act of March 2, 1917, c. 145, 39 Stat. 951.

¹³ See, *Garzot v. de Rubio*, 209 U. S. 283, 302.

rule Porto Rican tribunals upon matters of purely local concern¹⁴ or to decide against the local understanding of a local matter, not believed by this Court to be clearly wrong;¹⁵ and a disposition to accept the construction placed by a local court upon a local statute¹⁶ and to sustain such a construction in the absence of clear or manifest error.¹⁷

Taxing acts of Porto Rico are purely local and the traditional reluctance of this Court to overturn constructions of such local statutes by local courts is particularly applicable to interpretations of Porto Rican statutes by Porto Rican tribunals.¹⁸ Orderly development of the government of Porto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island.

The judgments of the Porto Rican courts in this case are not unsupported by logic or reason. They embody a recognition of our constitutional division of powers between the legislative and judicial branches of government. Believing the legislature had declined to give the right to sue to a taxpayer who computed his own tax from his own records and voluntarily paid it without protest, the Porto Rican courts properly declined to read implications into a statute which they could not fairly find there. In passing upon a previous construction of a Porto Rican statute by the Supreme Court of Porto Rico, this Court said, "The construction adopted in Porto Rico at least does no violence to the words of the statute; it concerns local affairs under a system with which the court of the Island is called on constantly to deal, and we are not prepared, as against the weight properly attributed to the local decision, to say that it is wrong."¹⁹ So here, we cannot say the Porto Rican courts were wrong. In failing to uphold their construction of the local statutes, the Circuit Court of Appeals was in error.

The judgment of the Court of Appeals is reversed and the complaint in the district court of Porto Rico must stand dismissed, as ordered by that court and affirmed by the Supreme Court of Porto Rico.

It is so ordered.

¹⁴ *Nadal v. May*, 233 U. S. 447, 454.

¹⁵ *Sante Fe Ry. v. Friday*, 232 U. S. 694, 700.

¹⁶ *Phoenix Ry. Co. v. Landis*, 231 U. S. 578, 579.

¹⁷ *Villanneva v. Villanneva*, 239 U. S. 293, 299; *Waialua Co. v. Christian*, 305 U. S. 91, 109; *Inter-Island Co. v. Hawaii*, 305 U. S. 306, 311.

¹⁸ *Diaz v. Gonzalez*, 261 U. S. 102, 105, 106.

¹⁹ *Cardova v. Folgueras*, 227 U. S. 375, 378, 379.

MICROCARD

TRADE MARK 

22



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

3792

3899

